(21,317.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 521.

ADAM T. SILER, McDOUGAL FERGUSON, AND LEW P. TARLTON, CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, APPELLANTS,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Record of the Proceedings of the Circuit Court of the United States for the Eastern District of Kentucky, in the Cause and Matter Hereinafter Stated, the Same Being Disposed of at a Regular Term of said Court Begun and Held in the City of Frankfort on the Second Monday in March, A. D. 1908, Being the 9th Day of said Month, and the Final Decree in said Cause Being Entered on the 10th Day of July, A. D. 1908.

Present: The Honorable A. M. J. Cochran, United States District Judge.

In Equity. No. 542.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, MCDOUGAL FERGUSON, and LEW P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

2 Said Action was commenced on the 25th day of July, A. D. 1906, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

On the 25th day of July, A. D. 1906, Complainant filed its Bill of Complaint in said cause, which said Bill is in words and figures as follows, viz:

3 In the Circuit Court of the United States, for the Eastern Judicial District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, ADAM T. SILER and MCDOUGAL FERGUSON, Individually, and as Constituting the Railroad Commission of the State of Kentucky, Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Eastern Judicial District of Kentucky:

The complainant, Louisville & Nashville Railroad Company, states it is a corporation duly created, chartered, organized and existing under the laws of the State of Kentucky, having its principal office and place of business in the city of Louisville, Jefferson County,

Kentucky; that it is a citizen and resident of said State, and by virtue of its charter and the amendments thereto, it has and had at the dates hereinafter mentioned, the power to sue and be sued, contract and be contracted with, and to construct, own, lease,
4 control, maintain and operate steam railroads in the State of Kentucky and other States as a common carrier of intra-state and interstate freight and passengers; and it brings this, its bill of complaint against the defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually, and as constituting the Railroad Commission of the State of Kentucky, who are citizens and residents of said State. The defendant Adam T. Siler is an inhabitant of the Eastern Judicial District, and the defendants, Charles C. McChord and McDougal Ferguson are inhabitants of the Western Judicial District of Kentucky. And the said defendants are the duly elected, qualified and acting members of and constitute the Railroad Commission of the State of Kentucky, the principal office of which Commission is fixed by law at Frankfort, the seat of government of said State, in the Eastern Judicial District of Kentucky, whereof the defendants as and constituting said Commission are all inhabitants.

I.

The complainant was incorporated and organized under an act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to Charter the Louisville & Nashville Railroad Company," approved March 5, 1850, whereby complainant was authorized to construct and operate a railroad from Louisville, Kentucky, to the State line in the direction of Nashville, Tennessee. Thereafter said charter was amended by an act of said General Assembly, approved March 20, 1851, and by its said charter as thus amended complainant was authorized to construct and operate a branch of its railroad
5 to the Mississippi River, and any other branches it might desire. Again its charter was amended by an act of said General Assembly, approved January 17, 1856, and by its charter as thus amended complainant was authorized to purchase and hold any railroad constructed by any other company. Its said charter was amended by divers other acts of said General Assembly, and by virtue of its charter as thus amended from time to time, and upon the faith thereof, complainant has constructed, purchased and acquired, and now owns, holds and operates the following railroads within the State of Kentucky:

Main Stem, from Louisville to the Tennessee State line, constructed about 1859	139.88
Bardstown Branch, from Bardstown Junction, on Main Stem, to Bardstown, acquired about 1860, and Springfield Branch, from Bardstown to Springfield, acquired about 1889, and together constituting the Bardstown & Springfield Branch	37.44
Bloomfield Branch, from Shelbyville to Bloomfield, acquired September 28, 1901	26.72
Cincinnati Division, from Louisville to Newport, acquired about 1881	113.83

Clarksville & Princeton Branch, from Gracey to Tennessee State line, in the direction of Clarksville, Tennessee, acquired about 1886 ..... 23.17
(That portion of this branch between Gracey and Princeton, acquired about the same time, 20.70 miles, is operated by the Illinois Central Railroad Company under a lease made to the Ohio Valley Railway Company.)
Greensburg Branch, from Lebanon on the Knoxville Branch to Greensburg, acquired August 3, 1903. 30.90
6 Cumberland Valley Division, from Corbin on the Knoxville Branch to the Tennessee State line at Cumberland Gap, constructed about 1890 ..... 47.12
Chenoa Branch, from Cumberland River and Tennessee Railroad Junction, on the Cumberland Valley Division, to Chenoa, acquired September 28, 1901 ..... 12.35
Elkton & Guthrie Railroad Branch, from Elkton Junction to Elkton, operated under lease from the owners, dated December 1, 1904 ..... 10.92
Glasgow Railway Branch, from Glasgow Junction, on Main Stem, to Glasgow, operated under lease from the owners, commencing in 1897 ..... 10.50
Henderson Division, from Guthrie, on Memphis line, to Henderson ..... 97.76 miles
and Madisonville & Providence Branch from Madisonville, on the Henderson Division, to Providence ..... 16.10 miles

acquired about 1879; total 113.86
Kentucky Central Division, Main Line, from Covington to Sinks, a point near Livingston, on the Knoxville Branch ... 149.88 miles
Lexington & Paris Branch, from Lexington to Paris ..... 17.86 miles
Paris & Maysville Branch, from Paris to Maysville ..... 49.48 miles
Richmond Branch, from a point near Richmond to Rowland, on the Knoxville Branch ..... 30.43 miles

all acquired September 26, 1891; total 247.65
7 Knoxville Branch, from Lebanon Junction on the Main Stem, to the Tennessee State Line at Jellico, constructed at different times and completed about 1882 ..... 171.17
Jellico, Birdeye & Northern Branch, or Halsey Branch, from Jellico to Halsey, acquired July 16, 1902 ..... 7.79
Knoxville, La Follette & Jellico Division, from Saxton to Tennessee State Line, acquired January 1, 1905 ..... 3.73
Lexington Branch, from Lagrange on the Cincinnati Division, to Lexington, acquired about 1881 ..... 67.00

Shelby cut-off, from Christiansburg on the Lexington Branch, to Shelbyville, constructed about 1895.....	8.51
Louisville, Harrod's Creek & Westport Branch, from First and Water Streets, in Louisville, to Pipe Line Avenue, near the Louisville Waterworks, acquired about 1881..	3.46
(The remainder of this branch, from Pipe Line Avenue to Prospect, acquired at the same time, has been sold and conveyed to the Louisville & Interurban Railway Company, but is operated by complainant for freight purposes)	7.70
Memphis Line, from Memphis Junction, on the Main Stem, to the Tennessee State Line at Guthrie, constructed about 1859.....	46.46
Middlesborough Railroad, consisting of tracks around Middlesborough, and extending therefrom to the Tennessee State Line, acquired about 1897.....	16.02
Owensboro & Nashville Division, from Owensboro to Adairville, 83.46 miles, with a branch from Penrod to Mud River, 4.64 miles, acquiured about 1880, total	88.10
8 Shelby Branch, from Anchorage, on the Cincinnati Division, to Shelbyville, acquired about 1881	19.10
Wilton Branch, from Wilton Junction, on the Knoxville Branch, to Lorena, constructed about 1901.....	4.41
Complainant also constructed, about 1903, and operates the Brush Creek Branch, from Brush Creek on the Kentucky Central Division, to Johnetta.....	4.85
Complainant further states that it owns the Newport & Cincinnati Bridge, and operates the railroad tracks connected therewith from Newport to the Ohio State Line, acquired in June, 1904.....	.54
Complainant also leased in 1902, and operates over the tracks of the Henderson Bridge & Railroad Company, formerly the Henderson Bridge Company, in and from Henderson to the Indiana State Line.....	.47
Under trackage arrangements, acquired September 26, 1891, complainant operates over the tracks of the Covington & Cincinnati Elevated Railroad & Transfer and Bridge Company, from Covington to the Ohio State Line	1.58
The total mileage of said railroad owned or leased and operated by complainant in Kentucky for each of the fiscal years ended June 30, 1905, and June 30, 1906, was	1,265.23
In addition to the foregoing mileage of railroads complainant owns, but does not operate, the Paducah & Memphis Division, acquired about 1897, which is leased to and operated by the Nashville, Chattanooga & St. Louis Railway, the portion of said division situated in Kentucky being	49.40

9 The said railroads so described within the State of Kentucky are parts of through lines of railroad operated by complainant. The Main Stem extends from Louisville to Nashville, Tennessee, and thence southwardly to Decatur, Birmingham, Montgomery and Mobile, Alabama, Pensacola, Florida, and through Mississippi to New Orleans, Louisiana. The Henderson Division extends from Nashville, Tennessee, through Guthrie and Henderson, Kentucky, to Evansville, Indiana, where it connects with complainant's St. Louis Division, extending through Indiana and Illinois to St. Louis, Missouri. The Cincinnati Division extends from Newport to Cincinnati, Ohio, and the Kentucky Central Division extends from Covington to Cincinnati, Ohio. The Kentucky Central Division also connects with the Knoxville Branch, which at Corbin connects with the Cumberland Valley Division, which extends to Big Stone Gap and Norton, Virginia. The Knoxville Branch extends to Jellico and Knoxville, Tennessee, thence by the lines of complainant to Atlanta, Georgia, and Murphy, North Carolina. The Memphis line extends from Guthrie southwestwardly to Memphis, Tennessee; and at all terminal points of complainant's railroads, and at many other points, both in and out of Kentucky, complainant's lines of railroad make connections with other railroads, whereby there can be, and is carried on through bills of lading, freight between points in Kentucky and all parts of the United States. Complainant's system of railroads owned or leased, and operated by complainant, of which those in Kentucky, above described, are an integral part, contained 4,101.05 miles for the fiscal year ended June 30, 1905, and now contains an operated mileage of 4,290.08 in and out of Kentucky, and said system extends into, reaches and traverses thirteen States, viz: Missouri, Illinois,
10 Indiana, Ohio, Kentucky, Tennessee, Virginia, North Carolina, Georgia, Alabama, Florida, Mississippi and Louisiana. Complainant carries and has for many years carried a large traffic over its lines located in Kentucky both freight and passenger, and both intra-state and interstate, about seventy (70%) per cent. of such traffic transported over its lines in Kentucky in the fiscal year ended June 30, 1905, in prior years, and since, being strictly interstate traffic, and much of the remainder being virtually interstate traffic, the rates upon which having a direct and vital connection with the rates on interstate traffic, and a far-reaching effect and influence upon commerce between the several States.

II.

Complainant states that by its said charter and the amendments thereto it was authorized to charge and collect for the transportation of goods, merchandise and property of any kind whatever, any sum not exceeding the following rates, to-wit:

For every one hundred pounds transported over twenty miles and under fifty miles, three and one-half (3½) mills for each mile; for all other transportation of freight and property, not exceeding four (4) mills for each mile per hundred pounds; for transporting single packages any distance weighing not less than one

hundred pounds, twenty-five (25) cents; for transporting live stock, poultry, furniture, feathers, wool, rags, and other like light bulky articles, weighing not more than sixty-five (65) pounds to the cubic foot, not exceeding fifteen (15) per cent. above the rates allowed to be charged for heavy merchandise. Gold, silver, bullion, money of all kinds, and mails, are expected from the rates established in its said charter, and complainant's board of direc-
11 tors is thereby authorized to contract especially therefor. For the transportation of passengers complainant is authorized to charge not exceeding four (4) cents per mile for each passenger with his baggage, weighing not more than forty (40) pounds. Said maximum rates, which complainant is thus authorized to charge and collect, are set out, in part, in section eighteen (18) of its original charter, approved March 5, 1850, and, in so far as they are not set out in that section, complainant is authorized by that section to charge and collect the same maximum rates as were, at the date of the passage and approval of its said original charter, authorized to be charged and collected by and on the railroad from Lexington to Frankfort, Kentucky, which maximum rules were on March 5, 1850, as set out in section twenty (20) of the act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to incorporate the Lexington & Frankfort Railroad Company," approved February 28, 1848, and said maximum rates so provided for in section twenty (20) of said last-mentioned act were in full force and effect, charged and collected, upon said railroad from Lexington to Frankfort on March 5, 1850.

Complainant states that by reason of the premises there was thus a valid contract made, which still subsists, between the Commonwealth of Kentucky and complainant, whereby complainant was and is authorized to charge and collect on the railroads owned or leased and operated by it within said Commonwealth, rates for the transportation of freight and passengers, not exceeding the maximum rates herein above set out, under its said charter and the amendments thereto, and complainant states that said railroads in Kentucky were constructed and acquired by it upon the faith of
12 said contract. Complainant further states that the provisions of its said charter which thus granted and authorized it to charge and collect the maximum rates aforesaid have never been repealed by any act of the General Assembly of the Commonwealth of Kentucky, and the same are still in full force and effect.

Complainant states that it has never charged and collected on any of the railroads it owned or operated for the transportation of property or persons in the State of Kentucky any rate or rates in excess of the maximum rates prescribed and authorized by its charter as aforesaid.

III.

Complainant states that by section two hundred and nine (209) of the Constitution of the State of Kentucky, adopted September 28, 1891, the Railroad Commission of that State was established and provided for as follows:

"A commission is hereby established, to be known as 'The Rail-
"road Commission' which shall be composed of three Commis-
"sioners. During the session of the General Assembly which con-
"venes in December, eighteen hundred and ninety-one, and before
"the first day of June, eighteen hundred and ninety-two, the Gov-
"ernor shall appoint, by and with the advice and consent of the
"Senate, said three Commissioners, one from each Superior Court
"District as now established, and said appointees shall take their
"office at the expiration of the terms of the present incumbents.
"The Commissioners so appointed shall continue in office during the
"term of the present Governor, and until their successors are elected,
"and qualified. At the regular election in eighteen hun-
13 "dred and ninety-five, and every four years thereafter, the
"Commissioners shall be elected, one in each Superior Court
"District, by the qualified voters thereof, at the same time and for
"the same term as the Governor. No person shall be eligible to
"said office unless he be, at the time of his election, at least thirty
"years years of age, a citizen of Kentucky two years, and a resident
"of the district from which he is chosen one year, next preceding
"his election. Any vacancy in this office shall be filled as provided
"in section one hundred and fifty-two of this Constitution. The
"General Assembly may from time to time change said districts so
"as to equalize the population thereof; and may, if deemed expe-
"dient, require that the Commissioners be all elected by the quali-
"fied voters of the State at large. And if so required, one Com-
"missioner shall be from each district. No person in the service of
"any railroad or common carrier company or corporation, or of any
"firm or association conducting business as a common carrier, or
"in anywise pecuniarily interested in such company, corporation,
"firm or association, or in the railroad business, or as a common
"carrier, shall hold such office. The powers and duties of the Rail-
"road Commissioners shall be regulated by law; and until otherwise
"provided by law the commission so created shall have the same
"powers and jurisdiction, perform the same duties, be subject to the
"same regulations, and receive the same compensation, as now con-
"ferred, prescribed and allowed by law to the existing Railroad
"Commissioners. The General Assembly may, for cause, address
"any of said Commissioners out of "office by similar proceedings
"as in the case of Judges of the Court of Appeals; and the
14 "General Assembly shall enact laws to prevent the non-
"feasance and misfeasance in office of said Commissioners,
"and to impose proper penalties therefor."

Complainant states that said Railroad Commission on or prior to September 28, 1891, the date the present Constitution of the State of Kentucky was adopted and went into effect, had not been empowered by any then existing constitutional or statutory provision to regulate or to fix the rate, toll or compensation, which a railroad company or corporation might charge, collect or receive for the service of transporting freight or passengers over its line or lines of railroad in that State, nor was there any attempt made by the General Assembly of the State of Kentucky afterward to

confer such power upon said Commission until March 10, 1900, when said General Assembly attempted to grant such power to said Commission by enacting what is commonly called the "McChord Act," which, including its title, is as follows:

"An Act to prevent railroad companies or corporations owning "and operating a line or lines of railroad, and its officers, agents "and employés from charging, collecting or receiving extortionate "freight or passenger rates in this Commonwealth, and to further "increase and define the duties and powers of the Railroad Com- "mission in reference thereto, and prescribing the manner of en- "forcing the provisions of this act and penalties for the violation "of its provisions.

"Be it enacted by the General Assembly of the Commonwealth "of Kentucky:

"1. When complaint shall be made to the Railroad Commission "accusing any railroad company or corporation of charging, "collecting or receiving extortionate freight or passenger "rates, over its line or lines of railroad in this Common- "wealth, or when said commission shall receive information, or have "reason to believe that such rate or rates are being charged, collected "or received, it shall be the duty of said commission to hear and "determine the matter as speedily as possible. They shall give the "company or corporation complained of not less than ten days' "notice, by letter mailed to an officer or employé of said company "or corporation, stating the time and place of the hearing of same; "also the nature of the complaint or matter to be investigated, "and shall hear such statements, arguments or evidence offered "by the parties as the commission may deem relevant, and should "the commission determine that the company or corporation is, or "has been, guilty of extortion, said commission shall make and "fix a just and reasonable rate, toll or compensation, which said "railroad company or corporation may charge, collect or receive "for like services thereafter rendered. The rate, toll or compensa- "tion so fixed by the commission shall be entered and be an order "on the record book of their office and signed by the commission, "and a copy thereof mailed to an officer, agent or employé of the "railroad company or corporation affected thereby, and shall be in "full force and effect at the expiration of ten days thereafter, and "may be revoked or modified by an order likewise entered of record. "And should said railroad company or corporation or any officer, "agent or employé thereof, charge, collect or receive a greater or "higher rate, toll or compensation for like services thereafter "rendered than that made and fixed by said commission, as "herein provided, said company or corporation, and said offi- "cer, agent or employé shall be deemed guilty of extortion, and "upon conviction shall be fined for the first offense in any sum "not less than five hundred dollars, nor more than one thousand "dollars, and upon a second conviction, in any sum not less than "one thousand dollars nor more than two thousand dollars, and "for a third and succeeding convictions, in any sum not less than "two thousand dollars nor more than five thousand dollars.

"2. The Circuit Court of any county into or through which the

"line or lines of road carrying such passenger or freight, owned "or operated by said railroad, and the Franklin Circuit Court shall "have jurisdiction of the offense against the railroad company or "corporation offending, and the Circuit Court of the county where "such offense may be committed by said officer, agent or employé, "shall have jurisdiction in all prosecutions against said officer, agent "or employé.

"3. Prosecutions under this act shall be by indictment.

"4. All prosecutions under this act shall be commenced within "two years after the offense shall have been committed.

"5. In making said investigation, said commission may, when "deemed necessary, take the depositions of witnesses before an ex-"aminer or notary public, whose fee shall be paid by the State, "and upon the certificate of the chairman of the commission, ap-"proved by the Governor, the Auditor shall draw his warrant upon "the Treasurer for its payment.

"Approved March 10, 1900."

17 By this act the said General Assembly, without lawful power so to do, undertook to authorize said Railroad Commission, when complaint shall be made to it, or when it receives information, or has reason to believe that any railroad company or corporation is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in the State of Kentucky, to perform judicial functions, that is to say, to hear and determine the matter as speedily as possible, having first given ten days' notice to the company or corporation complained of by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing, also the nature of the complaint or matter to be investigated; and the said General Assembly by the act aforesaid, without lawful power so to do, attempted to confer the judicial power upon said Commission to hear such statements, arguments or evidence offered by the parties as the said Commission may deem relevant; and, should said Commission determine, in the exercise of the powers of a court sought to be thus granted to it, that the company or corporation is, or has been, guilty of extortion, the said General Assembly, without lawful power so to do, undertook to grant or delegate to said Commission legislative power, and to impose on it the duty to make and fix, without further notice or investigation, a just and reasonable rate, toll or compensation which such railroad company or corporation may charge, collect or receive for like services thereafter rendered. According to the provisions of said act the rate, toll or compensation so fixed by said Commission shall be entered and be an order on the record book of its office, and be in full force and effect at the expiration of ten days after said Commission shall have mailed a copy of the order fixing the same to any officer, agent or employé of
18 the company or corporation affected thereby; and said act further provides that such order of said Commission may be at any time, without further notice, evidence or investigation, revoked or modified by an order of said Commission likewise entered of record.

It is further provided by said act that should such railroad company or corporation, or any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as aforesaid, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense in any sum not less than five hundred ($500) dollars, nor more than one thousand ($1000) dollars, and, upon a second conviction, in any sum not less than one thousand ($1000) dollars, nor more than two thousand ($2000) dollars, and for a third and succeeding convictions in any sum not less than two thousand ($2000) dollars, nor more than five thousand ($5000) dollars.

The said act further provides that the Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by such railroad company or corporation, and the Franklin Circuit Court, in said State, shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

19 IV.

By the provisions of Section 819, Kentucky Statutes, which is Section 226 of an act entitled, "An Act providing for the creation and regulation of private corporations," which became a law April 5, 1893, the offenses of extortion and unjust discrimination by a railroad company or corporation are required to be prosecuted by indictment or action in the name of the Commonwealth of Kentucky, upon information filed by the Railroad Commissioners, and such indictments shall be made only upon the recommendation or request of the Railroad Commission filed in the court having jurisdiction of the offense. This section is in substance the same as section four (4) of the act of the General Assembly of the State of Kentucky, approved April 6, 1882, entitled, "An Act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations and in aid of that purpose to establish a board of Railroad Commissioners and define its powers and duties," set forth in the General Statutes of Kentucky, edition of 1888, page 1023. The said act of March 10, 1900, known as the McChord Act, does not appear to have been intended to change the settled legislative policy that indictments for such offenses should be found on the recommendation of the Railroad Commission, and the duty of enforcing any orders making and fixing a railroad rate under the provisions of the last mentioned act rests on the defendants constituting the said Railroad Commission.

20 V.

The Constitution of the State of Kentucky, which is now and has been since September 28, 1891, in full force and effect, contains these provisions:

"SEC. 27. The powers of the government of the Commonwealth of "Kentucky shall be divided into three distinct departments, and "each of them be confined to a separate body of magistracy, to wit: "Those which are legislative, to one; those which are executive, to "another; and those which are judicial, to another.

"SEC. 28. No person, or collection of persons, being of one of "those departments, shall exercise any power properly belonging to "either of the others, except in the instances hereinafter expressly "directed or permitted."

Said State Constitution also provides as follows:

"SEC. 109. The judicial power of the Commonwealth, both as to "matters of law and equity, shall be vested in the Senate when sit- "ting as a court of impeachment, and one Supreme Court (to be "styled the Court of Appeals) and the courts established by this "Constitution.

"SEC. 135. No courts, save those provided for in this Constitution, "shall be established."

The said Railroad Commission is not a court established by said Constitution, nor is it by any provision thereof vested with any judicial or legislative powers or functions whatever concerning rates or otherwise, nor is the General Assembly thereby authorized to legislate upon, regulate or fix such rates for the transportation
21 of freight or passengers, or to grant or delegate any judicial or legislative powers to said Commission to regulate or fix railroad rates for the transportation of freight or passengers within the State of Kentucky. But, notwithstanding said provisions of the present Constitution of the State of Kentucky, the General Assembly, in violation thereof, by said McChord Act of March 10, 1900, attempted to grant and delegate to and combine in said Railroad Commission all three of the fundamental powers of said State government or of a government republican in form, viz.: Those which are legislative; those which are executive; and those which are judicial; so that said Commission is an anomalous and unconstitutional body, which, with respect to all proceedings or investigations before it concerning the rates charged, collected or received by railroad carriers of intrastate freight and passengers, occupies the attitude of complainant, judge, legislator and prosecutor. It may itself be the complainant, or may act as the complainant's attorney; as judge, it may try all preliminary questions and pass on the guilt or innocence of the carrier accused of extortion; as legislator, it may make and fix the compensation of the carrier found by it guilty of extortion for like services thereafter rendered; as informer, it may procure indictments by the Grand Jury for any disobedience of its legislative acts; and as prosecutor, it may recover in behalf of the State from the carrier thus indicted the penalties imposed by said act for such disobedience.

No appeal to any court or tribunal possessing judicial powers is allowed or provided for by said McChord Act, or any other statute of the State of Kentucky, in behalf of the railroad carrier, from any order of said Commission adjudging it guilty of extortion, or from any order of said Commission making and fixing what it shall
22 have determined to be a just and reasonable rate, toll or compensation, which such railroad carrier may charge, collect or

receive for like services thereafter rendered, in lieu of the rate, toll or compensation held by said Commission to be extortionate. A judicial investigation or judicial review of the question of the reasonableness of the existing rate, toll or compensation being charged, collected or received by a railroad carrier, or of the accusation of extortion, is not allowed or provided for by said McChord Act or any statute of the State of Kentucky. The order or judgment of said Commission adjudging that an existing rate of any railroad carrier operating a line of road in the State of Kentucky for the transportation of intrastate freight or passengers is extortionate, or that such carrier is guilty of extortion, is final and conclusive, or intended so to be, by any fair or reasonable construction of said act; and in any prosecution by indictment in the Circuit Court, having criminal jurisdiction to recover the penalties imposed by said act for disregarding such order or judgment of said Commission, or for charging, collecting or receiving a higher or greater rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, neither the carrier, its officer, agent or employé, indicted for the alleged offense of extortion, is allowed by the terms or provisions of said McChord Act, or any statute of the State of Kentucky, to make or establish by evidence the defense that the existing rate charged, collected or received is just and reasonable, or that the rate made and fixed by said Commission is not just and reasonable.

Furthermore, were such a defense allowed, the issue raised thereby could not be, in the nature of the case, tried by a jury or a court of criminal jurisdiction. Besides, different juries or courts, were
23 such a defense permitted, might reach different conclusions on the same or similar testimony as to whether the offense of extortion had been committed; and the criminality of the act of the carrier or its officer, agent or employé indicted would depend on the view of the jury or court of the reasonableness of the rate charged, collected or received, and the question of reasonableness would depend on many uncertain and complicated elements.

Complainant states that the rate, toll or compensation made and fixed by said Commission as, in its opinion, a just and reasonable one for certain services in the transportation of intrastate freight or passengers, to be thereafter followed or observed by the carrier, is, by any fair or reasonable construction of said McChord Act, not simply advisory nor merely *prima facie* just and reasonable, but final and conclusive as to what is a just and reasonable rate, toll or compensation for the services of the carrier, as prescribed by said Commission, for like services thereafter rendered, and said act neither contemplates nor allows any issue to be made or inquiry to be had as to the justness or reasonableness in fact of any rate, toll or compensation made and fixed by said Commission, which, under the provisions of said act, is the only one that is lawful, and, in contemplation of law, the only one that is just and reasonable, and in any proceeding under said act to enforce the final order or ruling of said Commission, in these respects, by the recovery of the fines and penalties imposed thereby or otherwise, there is no fact left to be traversed or reviewed by the court or jury, except the fact of the

alleged violation of said act in not complying with such final order or ruling of said Commission.

Complainant states that said McChord Act is violative of the sections of the State Constitution of Kentucky hereinabove referred to, and is, therefore, void.

24 VI.

Complainant further states that said McChord Act is not only unconstitutional and void as violative of the Constitution of the State of Kentucky, but it constitutes an abandonment by said State of a republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and is, therefore, void.

The said act deprives the carrier interested or affected of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor as an absolute finality the action of said Railroad Commission, which, in view of the provisions of the Constitution of the State of Kentucky, is and can be at most only an administrative body or tribunal, and is not and can not be clothed with judicial powers or functions, and does not possess the machinery of a court of justice, and is, therefore, incapable of affording the judicial investigation to which complainant and other railroad carriers are entitled, and by the enforcement of the provisions of said act complainant is denied the privilege and right to have judicially determined by a court of competent jurisdiction whether or not the rates charged, collected or received by it for the transportation of intrastate freight and passengers on its lines of road in the State of Kentucky, are just and reasonable, and whether or not
25 the rates made and fixed by said Commission for like services thereafter rendered are in fact just and reasonable, or a confiscation or spoliation of its property.

Furthermore, complainant states that said McChord Act, in so far as it attempts to clothe said Railroad Commission with legislative, executive and judicial powers of an arbitrary nature over the property of railroad carriers and the use thereof, is an act by the State of Kentucky, the enforcement of which operates to deprive such carriers of their property without due process of law, and to deny such carriers the equal protection of the laws, and said act is, therefore, unconstitutional and void, being in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant further states that said McChord Act has not been construed in any case by the Court of Appeals, the highest court of the State of Kentucky, nor has it been upheld in any case as valid or constitutional, measured by either the Constitution of the State of Kentucky or the Constitution of the United States, by any court of competent jurisdiction, either State or Federal.

VII

Complainant further states that in its effort to prevent any judicial inquiry as to the validity of said McChord Act the General Assembly of the State of Kentucky burdened with excessive, extreme and cumulative fines and penalties any challenge thereof in the courts, so that the carrier or party affected thereby is necessarily constrained to submit to an unjust and unreasonably low rate made and fixed by said Commission for its services in transporting intrastate freight or passengers, rather than take the chances of the
26 fines and penalties imposed for a refusal or failure to comply with said Commission's final order making and fixing such rate, and thus such carriers are deprived by the State of Kentucky, through the operation of said act, of the equal protection of the laws in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Furthermore, the fines and penalties imposed and made cumulative by said McChord Act are excessive within the meaning and intent, and in violation of Section 17 of the State Constitution of Kentucky, and of Article VIII of the amendments to the Constitution of the United States, and said act is, therefore, unconstitutional and void.

VIII.

Complainant states that, while all other common carriers are subject only to the common law requirement that their rates shall be just and reasonable, and, in case of a controversy, are entitled to have the judgment of the courts upon the question of the reasonableness thereof, the State of Kentucky by said McChord Act singles out common carriers by railroad and denies them the equal protection of the laws granted by said State to all other common carriers, and deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates, when the same are called in question or charged to be extortionate, and substitutes therefor the arbitrary determination of said Railroad Commission, a non-judicial body, which does not and can not afford a judicial hearing or determination of such questions brought before it; and, whereas,
27 all other common carriers, in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable, are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or burden attaches to such judicial determination, a common carrier by railroad is, by the provisions of said act, subjected, in the absence of any judicial investigation or determination whatever as to whether its rate is reasonable, and simply upon the determination of said non-judicial body that such railroad carrier is or has been guilty of extortion, to the penalty of having the power to make and fix its rate taken out of its hands and vested exclusively in said Commission, which is then, according to the provisions of said act, required to make and fix what it may think is a just and reasonable rate, toll or compensation to be charged, collected or received by such railroad carrier for like services thereafter rendered, and if such

railroad carrier fails or refuses to comply with the rate made and fixed by said Commission it is subjected, for every shipment passing over its line of road to which said Commission may desire the rate made and fixed by it to apply, to the prosecutions, excessive fines and cumulative penalties imposed and prescribed by said act, and thus such railroad carrier is deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

IX.

Complainant states that said McChord Act relates to and affects all freight and passenger rates charged, collected or received by railroad carriers in the State of Kentucky, and is not restricted to rates actually charged, collected or received within said State for the transportation of traffic, having its origin and destination
28 in said State, and by its terms and provisions said act is an express and direct interference with and regulation of interstate commerce, and in conflict with sub-section three (3), section eight (8), of article one (1) of the Constitution of the United States, which vests in the Congress of the United States the exclusive power to regulate commerce among the several States, which power the Congress has exercised by "An Act to regulate commerce," approved February 4, 1887, and the amendments thereto, and said McChord Act is, therefore, unconstitutional and void.

X.

Complainant further states that one J. Ed. Guenther, of Owensboro, Kentucky, wrote and mailed three communications, dated December 21, 1904, January 13, 1905, and February 3, 1905, addressed to the defendant, C. C. McChord, who was then and is still Chairman of the Railroad Commission of the State of Kentucky, wherein the said Guenther complained in substance that the rates charged by the Louisville & Nashville Railroad Company, Illinois Central Railroad Company, and Louisville, Henderson & St. Louis Railway Company, on interstate freight to and from Owensboro, as compared with the rates on like freight to and from Evansville, Indiana, and on intrastate freight to and from points in Kentucky to and from Owensboro, were unjust and unreasonable. For the purpose of investigating said Guenther's complaint, said Commission held a meeting at Owensboro on February 27, 1905, of which this complainant received notice, and also at other times and places; and in the course of such investigation it developed that the jobbers at Owensboro were under some apparent disadvantage as
29 compared with the jobbers at Henderson, Kentucky, and Evansville, in doing business at points in Kentucky reached via Green River. It also developed that so far as this complainant, Louisville & Nashville Railroad Company, was concerned, its rates from Owensboro to points on its Henderson Division had been somewhat increased on account of the operation of the long and short haul provision in the present Constitution of Kentucky, which became effective September 28, 1891; but, during the hearing of said

Guenther's complaint, local rates out of Owensboro to Henderson Division stations were put back to practically where they were before that provision took effect, and some changes were made in local rates to stations reached via Green River, which more nearly placed Owensboro on an equality with Evansville as to these stations, all of which was done with the full knowledge of said Commission. On August 16, 1905, at the conclusion of said investigation, said Commission announced its decision, that, so far as the interstate rates complained of were concerned, Owensboro was entitled to the Evansville basis, and ordered that a petition in accordance with the provisions of Section 826, Kentucky Statutes, be filed before the Interstate Commerce Commission against all railroad carriers in Trunk Line and Central Freight Association territory participating in business to and from Owensboro and Henderson, asking that such carriers be compelled to put those cities on the same basis as Evansville. This petition was subsequently filed, and said controversy with respect to interstate freight rates is still pending and undetermined before the Interstate Commerce Commission. As to the local rates complained of, said Commission then made no finding.

Thereafter the said Guenther prepared an amended complaint, which said Commission permitted to be filed, to which this
30 complainant and all other railroad companies operating lines in the State of Kentucky were made defendants, and wherein it was alleged, in substance, that all local freight rates to and from all local points in the State of Kentucky as fixed and charged by all railroad companies on all classes of freight were excessive, discriminatory and extortionate. In his prayer for relief he asked the said Commission to revise and adjust not only the local freight rates in and out of Owensboro, but the rates between all local points, from and to every local point, throughout the entire State of Kentucky.

On September 14, 1905, three lumber companies of Louisville, Kentucky, viz., the Norman Lumber Company, Louisville Veneer Mills, and Calloway Lumber Company, tendered their petition to be made parties to said Guenther's proceeding and complained with respect to all local rates in the State substantially as the latter had in his amended complaint, but particularly the classifications made by railroad carriers of different kinds of logs, lumber, cross-ties and other timber commodities, and of the rates thereon to and from all points in Kentucky as unjust, discriminatory and extortionate. These lumber companies also complained that shippers of logs and lumber on flat cars were required by such carriers to furnish the standards to secure the loads on such cars and that such standards were treated as part of the logs or lumber hauled with no deduction from the freight charge thereon.

On October 3, 1905, certain attorneys, claiming to have been employed by the Governor pursuant to a notice by the Attorney-general that he was so engaged in other matters he could not give the questions involved in the complaints aforesaid before said Commission
his full time and attention, and to thus represent the Com-
31 monwealth of Kentucky, tendered and offered to file an intervening petition making said Commonwealth a party complainant against all the railroad companies operating lines in said

State as defendants. To the offer of said attorneys to have the Commonwealth of Kentucky made a party to said proceeding, and to file said pleading in its name and behalf, this complainant objected on the ground that there is no statute or other authority of law making it the duty of the Attorney-general to represent the complainant in such a proceeding concerning railroad rates on intrastate traffic before said Commission, or to make the Commonwealth of Kentucky a party complainant thereto or to represent said Commonwealth therein, and that any notice by the Attorney-general of his inability to attend to said proceeding did not authorize the Governor to employ attorneys in behalf of the Commonwealth of Kentucky, or to make said Commonwealth a party complainant thereto by an intervening petition or otherwise. But, notwithstanding there was no legal authority therefor, said Commission, on October 12, 1905, over the objection aforesaid of this complainant, as well as like objections made at the time by the other defendant carriers in said proceeding, ordered that the Commonwealth of Kentucky be made a party complainant, and allowed said intervening petition to be filed, so that said Commonwealth might prosecute said proceeding against this complainant and all the other carriers made defendants thereto. At the same time said lumber companies were ordered to be made complainants.

Complainant states said intervening petition thus filed and thereafter prosecuted in the name of the Commonwealth of Kentucky, without authority of law, alleged generally that the rates charged, collected and received by complainant and other railroad car-
32 riers in Kentucky, were discriminatory, unreasonable and extortionate. Prior to the filing of said intervening petition for the Commonwealth of Kentucky, the said Guenther, on October 3, 1905, asked said Commission to be allowed to dismiss his complaint and amended complaint, stating he did not desire to and would not prosecute said proceeding any further against the carriers made defendants thereto, but said Commission refused to let him do so, and said Guenther thereafter took no further step in the prosecution of said proceeding.

Complainant states that said McChord Act expressly provides that, when complaint shall be made to said Commission accusing any railroad company or corporation of charging, collecting or receiving any extortionate freight or passenger rates, said Commission "shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer, or employé thereof, stating the time and place of the hearing of same; also the *nature* of the complaint or matter to be investigated." This provision of the statute was not complied with, and this complainant was not notified of the nature of the complaint, that is, the particular rate or rates complained of were not specified. In none of the complaints or amended complaints in said proceeding before said Commission was there any specific or definite statement as to what rate, or between what points, or on what line of road, or on what class of freight or what commodity, was complained of or intended to be attacked as extortionate, except in the complaint of said lumber companies.

Before answering the complaints, amended complaints and intervening petitions in the proceeding aforesaid, this complainant, before the defendants constituting said Commission, took the following steps, to wit:

1. Filed a general demurrer to said Guenther's amended complaint, because it did not state facts sufficient to constitute or
33 support a cause of action against this complainant.

2. Moved that said Guenther be required to elect which of the alleged causes of action improperly joined and set forth in his amended complaint he would prosecute, and also to elect which one of the several defendant railroad carriers he would prosecute his complaint against, and, on his refusal to so elect, that all matters or statements therein concerning this complainant be stricken out, and further moved that said Guenther's complaint against this complainant be heard separately and apart from his complaint against the other defendant carriers;

3. Moved that all of said Guenther's amended complaint with respect to alleged discrimination in rates by this complainant between different communities be stricken out, because said Commission had no jurisdiction thereof;

4. Moved that said Guenther be required to make more definite and specific his amended complaint, and to file a bill of particulars showing specifically what local freight rates, and from and to what points, and on what commodities as fixed and charged by this complainant, were excessive, discriminatory and extortionate; what rates discriminated in favor of one community against others, and on what commodities, as well as the names of such communities;

5. Moved that the intervening petition of said lumber companies be stricken from the files of said Commission, because the same was filed without authority of law, and said lumber companies were neither necessary nor proper parties complainant to said proceeding;

6. Moved that all that part of the intervening petition of said lumber companies referring to the classifications of logs, lumber, cross-ties and timber commodities be stricken out, because
34 said Commission had no jurisdiction over classifications, and also that so much thereof as prayed that all rates on all commodities in Kentucky be reviewed and revised be stricken therefrom, because said lumber companies had no interest whatever in any rates on any commodities, except on logs, lumber, cross-ties and timber commodities;

7. Moved that the intervening petition of the Commonwealth of Kentucky be stricken from the files of said Commission, because the same was filed without authority of law, and said Commonwealth was neither a necessary nor proper party complainant in said proceeding concerning the rates charged or collected by this complainant for the transportation of freight on its lines in the State of Kentucky;

8. Moved that said Commonwealth be required to elect which of the alleged causes of action improperly joined in its intervening petition it would prosecute, and to elect which one of the several defendant carriers it would prosecute its complainant against, and,

on its refusal to so elect, that all matters and statements in its intervening petition concerning any alleged cause of action against this complainant so improperly joined with alleged causes of action against the other defendant carriers be stricken therefrom;

9. Moved that the Commonwealth of Kentucky be required to file a bill of particulars, to make its intervening petition more definite and certain, to specify what rates and on what commodities or freight and between what points on its lines in Kentucky were claimed by it to be extortionate, and what communities this complainant's rates discriminated against or preferred;

10. Filed a special demurrer to the intervening petition of the Commonwealth of Kentucky, because it showed said Com-
35 mission had no jurisdiction of this complainant or of the subject of the action therein stated, and that said Commonwealth had not legal capacity to sue or prosecute its complaint in the proceeding before said Commission;

11. Filed a general demurrer to the intervening petition of said Commonwealth, because it did not state facts sufficient to constitute or support a cause of action or complaint in behalf of said Commonwealth against this complainant;

12. Moved that all of the intervening petition of the Commonwealth of Kentucky concerning alleged discrimination in rates between communities, and preference to some localities against others, be stricken out, because said Commission had no jurisdiction thereof.

Each and all of this complainant's said demurrers and motions were arbitrarily overruled, ignored and disregarded by the defendants herein, as were like demurrers and motions made at the same time by the other carriers made defendants to said proceeding, and thereupon said Commission ruled that the entire subject of railroad rates was before it, and decided to proceed with its investigation, so-called, of such rates between all points on all railroads and on all classes and commodities in the State of Kentucky.

This complainant then, without waiving any question of law or procedure, raised by its said demurrers and motions, filed its answer traversing every affirmative allegation and material averment of said complaints, amended complaints and intervening petitions.

The complaint of said lumber companies was first taken up and a decision was rendered thereon December 7, 1905, by said Commission, so far as the same pertained specifically to the rates on logs, lumber and cross-ties, and to stakes or standards on flat cars loaded with logs or lumber, in which it was held and ordered, in
36 substance, that all the railroad carriers made defendants to said proceeding should:

1. Make their rates on walnut, cherry and cedar lumber no higher than the rates then shown in their published tariffs on oak, poplar and other grades of lumber, and that their rates on walnut, cherry and cedar logs be no higher than the rates then shown in their published tariffs on oak, poplar and other grades of logs, and that said log rate be no higher than seventy per cent. of their lumber rate so fixed;

2. Make their rates on cross-ties no higher than their rates on lumber thus fixed; and

3. Make no charge for the transportation of stakes or standards used in equipping their flat cars for the transportation of logs and lumber.

Said Commission then held and adjudged that all rates in excess of those fixed on the commodities aforesaid were extortionate, unjust and unreasonable.

After the receipt of a certified copy of this order, this complainant, in a communication by its General Counsel, addressed to the defendant, C. C. McChord, Chairman, dated December 16, 1905, which he duly received by mail, stated to said Commission that said order would be, under protest, put into effect by complainant, notwithstanding it materially reduced its receipts on intrastate traffic, and although invalid for the following reasons set forth therein, among others, that might have been urged:

1. The statute under which the Commission assumed to act is unconstitutional and void, because it provides for no judicial review of the Commission's judgment that existing rates on such traffic are extortionate, unjust and unreasonable;

2. Said statute vests no power in the Commission to classify commodities, or to take those from one class and place them in another.

37 3. The Commission has no power to establish a schedule of maximum rates to be charged and collected by railroad companies;

4. The Commission has no authority of law to establish rules or regulations to be observed by railroad companies in the transportation of logs, or to require them to transport stakes or standards on flat cars loaded with logs, without charge or compensation;

5. The Commission, were said statute valid, has no power to make the general order it issued, without fixing between all points in lieu of the rate adjudged to be extortionate, the exact rate deemed to be a just and reasonable rate, toll or compensation, the railroad company affected may charge, collect or receive for like services thereafter rendered, which rate, toll or compensation so fixed by the Commission shall be entered on the record book in their office, and signed by the Commission, and a copy thereof mailed to an officer, agent or employee of the railroad company affected thereby. In other words, such order must be as specific as a judgment, and complete in itself, without aid or reference to anything else to ascertain its terms or meaning;

6. There was no complaint filed by any shipper or other person interested, and this complainant had no notice from the Commission by letter or otherwise of any complaint that its existing rates on logs should be less than on lumber of the same kind of timber between the same points on its lines in the State of Kentucky; that this complainant was afforded no hearing or opportunity to offer testimony on that question, nor was any such question submitted to the Commission for its decision, and the reduction of thirty per cent. in the rate on logs was ordered, without a trial, and this complainant

had been deprived of its property and the use thereof without due process of law.

38 Complainant, in its said communication, also notified said Commission that it reserved its right at any time to ignore said order or any part thereof, and to restore its then existing rates on either or all of said commodities between any or all points on its lines in the State of Kentucky.

XI.

After thus disposing of the specific contentions of said lumber companies, the defendants, constituting said Commission, for their own convenience, treated all of said general complaints as consolidated into one, and the same were thereafter prepared and heard together; and said Commission, without authority of law, assumed that there was involved in said proceeding the question of the reasonableness of all rates for the transportation of all classes of intrastate freight and commodities upon all railroads, to and from all points, within the State of Kentucky; and further assumed, without authority of law, that it had jurisdiction to hear and finally determine the same. On these assumptions, the said Commission, over the objection and protest of this complainant and the other railroad carriers made defendants to said proceeding, called for certain information and required answers to be made by this complainant, and the other railroad carriers operating lines in Kentucky, to numerous questions propounded in writing to them respectively, covering the operations and business of complainant, for the fiscal year ended June 30, 1905, and its condition as of that date. To answer these questions and to furnish the information therein called for, required the services of a large force of extra employés and accountants for a period of more than four months, and entailed an expense

39 upon complainant of many thousands of dollars; but the answers were made and the information furnished by complainant to said Commission as fully, accurately, and as much in detail as possible, and filed before said Commission. In addition to these answers and this information, the complainants in said proceeding introduced as witnesses the Traffic Manager, Assistant Comptroller, Auditor of Receipts, Consulting Engineer and General Manager of this complainant, whose testimony, in connection with the information called for and the answers to the questions propounded by said Commission, fully established the reasonableness of this complainant's existing rates on all its lines, branches, and divisions in the State of Kentucky.

On the other hand, neither the Commission nor the complainants introduced any evidence, or evidence that was competent, or that would have been received as competent or relevant by any court of justice, showing or tending to show this complainant's said existing rates were unjust, unreasonable or extortionate. The said Commission, however, prepared or caused to be prepared and, over the objection of this complainant and the other railroad carriers made defendants to said proceeding, considered as evidence in said alleged investigation, (1) a "table of comparative rates on local mileage scale

basis," wherein the rates of six of the railroad carriers, including this complainant, operating lines in Kentucky, on some classifications of freight and certain commodities were compared with those of each other, including those of the Illinois Central Railroad Company in Mississippi, as well as with the mileage scale of rates on the same or like classifications of freight and commodities established by the Railroad Commissions of other States, viz.: Illinois, Iowa,
40 Missouri, Georgia and Florida, and by the Central Freight Association; (2) a table of "comparison of local rates," wherein the existing local mileage scale rates of seven of the railroad carriers operating lines in Kentucky, including this complainant, between points in Kentucky, on certain classifications of intrastate freight, were compared with the mileage scale rates of four railroad carriers operating lines in other States, on like classifications of both intrastate and interstate freight, between points on their lines, whether within or without the State of Kentucky, for similar distances, as well as with the Chesapeake & Ohio Railway's local distance tariff, and with the Iowa Railroad Commission's distance tariff, on some classifications of freight, deemed similar, for like distances; (3) a table of "some comparisons of gross and net earnings," wherein a comparison was made of this complainant's gross and net revenue per mile from all traffic in Kentucky, intrastate and interstate, both passenger and freight, for the fiscal year ended June 30, 1904, with the gross and net revenue per mile from all such traffic for the same year received by the Illinois Central Railroad Company in Kentucky, the average of all railroad carriers in Kentucky, and the average of all such carriers in Illinois, Iowa, Missouri, Alabama, Georgia and Texas, respectively, as well as the average of all the States in the Interstate Commerce Commission's Groups 5 and 6, respectively; also a comparison of the Illinois Central Railroad Company's gross and net revenue per mile from all such traffic in Kentucky for the same year, with the gross and net revenue per mile from all such traffic received by this complainant in Kentucky, the average of all the railroad carriers in Kentucky, and all such carriers in the other States mentioned; and a comparison of the average of the gross and net revenue per mile from all such
41 traffic received by all railroad carriers in Kentucky with this complainant's and the Illinois Central Railroad Company's gross and net revenue per mile from such traffic in Kentucky, respectively, as well as with the average revenue per mile from such traffic received by all railroad carriers in all of the States mentioned, and Mississippi, respectively; (4) "distance table rates," wherein a comparison was instituted between the distance rates of this complainant and the Illinois Central Railroad Company on classifications of freight Nos. 1, 2, 3, 4, and 5, and the distance rates on the same or similar classifications of freight of the Rock Island Railway Company and the Chicago & Northwestern Railway Company in Iowa and Illinois, respectively; and (5) "distance table rates," wherein a comparison was made of Illinois, Iowa and Indiana local rates on classifications of freight Nos. 1, 2, 3, 4 and 5 with rates in Kentucky on the same or similar classifications of this complainant,

the Illinois Central Railroad Company, the Lousiville, Henderson & St. Louis Railway Company, the Cincinnati, New Orleans & Texas Pacific Railway Company and the Southern Railway Company in Kentucky, respectively. In this last-mentioned table it was stated by said Commission, in the caption thereto, "the rates in Ohio and Michigan being practically the same as in Indiana."

In addition to the foregoing tables of comparisons, over the objection and protest of this complainant and the other railroad carriers made defendants to said proceeding, the defendants, constituting said Commission, prepared or caused to be prepared certain other tables of comparison, and considered the same as evidence, as follows: (1) "table of comparative rates on the Louisville & Nashville Railroad, Illinois Central Railroad, Chesapeake & Ohio Railway, Southern Railway, and Cincinnati, New Orleans & Texas Pacific Railway," wherein were set forth the rates of said carriers from Louisville, Kentucky, or Lexington, Kentucky, to other points in Kentucky, giving the distances, on various classifications of freight and commodities; (2) "rates of Louisville & Nashville Railroad from Louisville, Newport, Covington, Lexington, Owensboro and Henderson," Kentucky, giving the distances, to certain other points in that State, on certain classifications of freight and commodities; (3) "rates on Illinois Central Railroad out of Louisville, Owensboro and Henderson, Kentucky," stating the distances, to certain other points in that State on certain classifications of freight and commodities; and (4) "table of comparative rates on the Louisville & Nashville and Illinois Central Railroads out of Louisville, Owensboro, and Henderson (including rates out of Covington on the Kentucky Central Division of the Louisville & Nashville Railroad, and rates and mileage scale of the C. N. O. & T. P. Railway Co. out of Lexington)," stating the distances to other points in Kentucky, on certain classifications of freight and commodities.

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These tables of comparisons between the distance rates and class rates of the several carriers operating lines of railroad in Kentucky with each other, and with the same kind of similar rates of other carriers operating lines of railroad in other States, or established by the Railroad Commissions of other States, although incompetent as evidence, constituted substantially all the evidence, legal or otherwise, offered or introduced by said Commission or the complainants in said proceeding to support the general allegations of the complaints therein. Even this incompetent evidence was obtained second-hand or as hearsay, and did not show that the rates actually charged and collected by the railroad cariers or this complainant in Kentucky are higher than the rates charged and collected on like classes of freight or commodities for the same distances by railroad carriers in other States, nor did it show what the rates actually charged and collected are, either in Kentucky, or in either of the other States above mentioned. No evidence of any kind was offered or introduced by said Commission or the complainants in said proceeding to prove the existence of a similarity of conditions and circumstances between the railroads in Kentucky and the

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railroads in either of the States named in said tables of comparisons nor the kind and amount of business done by each of the railroad carriers in Kentucky and in the other States used for purposes of comparison, nor the cost thereof, although the volume of business in one State may be and is greater per mile than in another State, while the cost of construction, maintenance and operation is less. On the contrary, this complainant introduced the uncontradicted testimony of numerous witnesses, showing the dissimilarity of conditions and circumstances affecting the construction, maintenance and operation of railroads in Kentucky as compared with the construction, maintenance and operation of railroads in the States of Illinois, Indiana, Iowa, Missouri, Mississippi, Georgia, Florida and Texas, respectively; and proved without contradiction that the cost of construction, maintenance and operation of this complainant's lines of railroad in Kentucky was materially and substantially greater than the cost of construction, maintenance and operation of railroads in either of said other States, thus justifying a materially and substantially higher rate on the same class of freight carried the same distance in Kentucky than in either of the States used for purposes of comparison by said Commission; and to fix
44 and enforce the same rates on railroads in Kentucky as would be just and reasonable in either of the said other States, would result in great injustice to this complainant.

Notwithstanding said tables of comparisons were worthless as evidence in said investigation, they were in fact made by said Commission the basis and grounds for the reduction in this complainant's rates on certain classes of intrastate freight carried on its lines in Kentucky hereinafter mentioned. There was no evidence introduced in said investigation, or considered by said Commission, showing or tending to show that this complainant's rates on any class of freight or any commodity on any of its lines of railroad in Kentucky were in and of themselves unjust, unreasonable or extortionate.

XII.

Complainant further states that the defendants, constituting the Railroad Commission of the State of Kentucky, in the proceeding and on the evidence aforesaid, on June 20, 1906, delivered a written opinion and order, whereby they determined without authority of law that the rates of complainant, as shown in its local freight tariff designated "Table A" for all distances under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M and N, to and from all points wholly within the State of Kentucky, are extortionate, unjust and unreasonable. A printed copy of this "Table A, Local Freight Tariff," is filed herewith as part hereof, marked "Exhibit No. 1."

Complainant states that said Commission also made a written order, which was afterward signed by said Commission and entered on the record book of their office, a copy of which opinion and orders was mailed to Thomas B. Harrison, District Attorney of
45 complainant for the District of Kentucky, and received by said Harrison, at Louisville, Kentucky, on July 20, 1906, whereby said Commission, without authority of law, ordered that

this complainant be and it was forbidden to charge, collect or receive for the transportation of commodities to and from points wholly within the State of Kentucky, rates in excess of the rates shown in a table (prepared by said Commission and made part of said order) and for the classes and distances therein stated, being the same classes and distances as set forth in complainant's said "Table A, Local Freight Tariff," with a proviso to said order that, where complainant has in effect a tariff or tariffs of rates upon any commodity or commodities belonging to either of said classes, and for any of said distances, less than that shown in said Commission's maximum table of rates, designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad," complainant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs. The original copy of said opinion and orders, mailed to complainant's District Attorney as aforesaid, including the table of rates, which said Commission undertook thereby to make, fix or establish for complainant, is filed herewith as part hereof, marked "Exhibit No. 2."

Complainant states said Commission, by its last-mentioned order, has attempted to make and establish for observance by complainant a schedule of maximum rates for the transportation of all freight classified and belonging to Classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M and N, between all points on its lines wholly within the State of Kentucky, something it had no lawful power or authority to do. After determining complainant's existing
46 rates, as set forth in complainant's Exhibit No. 1, are extortionate, unjust and unreasonable, the power of said Commission, even by the provisions of said McChord Act, was limited to making and fixing what said Commission held to be a just and reasonable rate for like services, thereafter rendered, but the rates which said Commission has undertaken by its said order to establish for complainant are not declared to be, nor are they, made and fixed by said Commission as just and reasonable rates to be charged, collected or received by complainant for like services thereafter rendered. They are promulgated as a schedule of maximum rates to be observed by complainant.

Furthermore, said Commission, without condemning or adjudging any of complainant's rates, except those set forth in its "Table A, Local Freight Tariff," as extortionate, which is a jurisdictional fact and condition precedent to its exercise of the power, if any it has at all, of making and fixing rates, has by the proviso to its said order undertaken to forbid complainant from charging, collecting or receiving rates in excess of those shown by any tariff or tariffs upon any commodity or commodities belonging to either of said classes, which are less for the same distances, than those shown in said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad." That is to say, complainant is by said Commission's order aforesaid prohibited from raising any rate or rates it has in force and effect on any commodity or commodities belonging to either of said classes, notwithstanding the fact that such rate or rates have not been found

by said Commission to be extortionate, and the further fact that they are less for the same distances than the maximum class rates made and fixed by said Commission on the classes to which
47 such commodity or commodities, on which lower rates are now charged, collected or received, properly belong.

Complainant states that so much, at least, of said Commission's order as undertakes to prohibit complainant from increasing its existing commodity rates or in tariffs other than its "Table A, Local Freight Tariff," from what they are to said Commission's maximum rates on the classes to which such commodities belong, is absolutely null and void.

Complainant has prepared and herewith files as part hereof, marked Exhibit No. 3, a "Comparison of present 'Table A' rates of L. & N. R. R. Co. with rates in Kentucky Railroad Commission's order of July 19, 1906," showing for all distances (*a*) complainant's present rates; (*b*) the new rates prescribed by said Commission, and (*c*) the reduction, should the order of said Commission become effective.

Complainant states that the reduction of its rates as ordered by said Commission amounts to and was intended to be twenty (20) per cent. of the existing rates shown by complainant's said "Table A, Local Freight Tariff" between all stations for distances of twenty (20) miles or less, and of twenty-five (25) per cent. of existing rates shown on that Tariff between all stations for distances over twenty (20) miles. On the basis of the results of operations for the fiscal year ended June 30, 1905, the annual reduction in complainant's receipts on intrastate freight in Kentucky would be $150,673.74, at least, if said order is enforced.

48 XIII.

Complainant states that in the written questions propounded to it by said Commission during said investigation, complainant was requested to furnish statements showing the actual amount of freight and passenger traffic in Kentucky, both intrastate and interstate, the receipts, cost of operation, and all other operating statistics, for the year ended June 30, 1905. To have furnished this information would have caused a delay of nearly twelve months, and involved a large amount of labor and the expenditure of a large sum. It was, therefore, agreed between complainant's representatives, said Commission and the complainants in said proceeding, that four representative months of said fiscal year, viz.: September and December, 1904, and March and June, 1905, should be taken, and that the information called for should be estimated for said entire fiscal year upon the basis of the actual results ascertained by an examination of the original way-bills, as well as the books, accounts, etc., for the four months so selected. By this method it was shown that the results of operating complainant's lines of railroad in Kentucky for the fiscal year ended June 30, 1905, on both intrastate and interstate business or traffic were as follows:

Gross earnings		$14,643,073.42
Operating expenses 69.16%, or	$10,127,125.78	
Taxes 3.42%, or	500,752.75	
Total		$10,627,878.53
Per cent. of operating expenses and taxes to gross earnings		72.58%
Of the entire business done in Kentucky 30.21% was intrastate business, making		4,424,235.77
This intrastate business in Kentucky was composed of the following items, to wit:		
Passenger	$1,387,554.91	
Express	170,384.46	
Excess baggage and storage	38,262.84	
Mails	163,980.35	
Other items	3,590.13	
Total passenger traffic		$1,763,722.69
Freight	$2,552,273.62	
Other earnings from operation	108,189.46	
Total freight traffic		2,660,463.08
Aggregate Passenger and Freight earnings		$4,424,235.77
Assuming that the cost or operating expenses for doing intrastate business was no greater proportionately than the general cost of operating expenses for doing the entire business in Kentucky, the proportion of operating expenses, including taxes (72.58%) chargeable to intrastate business was		3,211,110.32
On this basis the net earnings from intrastate business in Kentucky were		$1,213,125.45
Proportion of net freight earnings to total net earnings (57.69%)		699,852.07
Proportion of passenger, express, excess baggage and storage, mail and other net earnings from operation (outside of freight proper) to total net earnings (42.31%)		513,273.38
Average gross amount received for each ton of intrastate freight		$1.28
Average distance hauled of each ton of intrastate freight		97.96 miles
Average receipts on intrastate freight per ton per mile		1.307 cents
Average gross earnings intrastate freight per mile in Kentucky		2,017.24
Average gross earnings on intrastate passengers and freight per mile in Kentucky		3,496.78

Average gross amount received for each ton of interstate freight in Kentucky		$1.129
Average distance hauled in Kentucky of each ton of interstate freight	148.82 miles	
State, county and municipal taxes actually paid on railroad property and franchises in Kentucky in the fiscal year ended June 30, 1905	$491,332.86	
Such taxes accrued in excess of the amount paid within said fiscal year	9,419.89	
Total taxes		500,752.75
Fixed charges paid for interest on bonds		$5,179,414.68
Total mileage operated in said fiscal year by Louisville & Nashville Railroad Company in its entire system		4,101.05
Proportion of total mileage in Kentucky (1,265.23) to total mileage in entire system		30.85%
Gross earnings, intrastate and interstate, of entire system		38,599,660.26
Proportion of gross earnings in Kentucky to gross earnings of entire system		37.94%

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XIV.

Complainant states that the evidence in said investigation showed the following values and facts, to wit:

Valuation No. 1.

Total capital stock of Louisville & Nashville Railroad Company, par value	$ 60,000,000.00
Total of its bonded indebtedness, par value	114,440,500.00
Aggregate par value of capital stock and bonds	$174,440,500.00
Kentucky's share of the par value of the stock and bonds on basis of mileage operated (30.85%)	53,814,894.25
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	16,257,479.55
Kentucky's share of the par value of the stock and bonds on the basis of the proportion the gross earnings in Kentucky bears to the gross earnings of the entire system (37.94%)	66,182,725.70
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	19,993,801.43

VALUATION No. 2.

Total average of mean daily market prices of stock on the New York Stock Exchange during the fiscal year ended June 30, 1905 ($134.91 per share)	$ 80,948,400.00
Par value of bonds	114,440,000.00
Total	$195,388,900.00

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Kentucky's share of this value of the stock and bonds on the basis of mileage operated (30.85%)	$60,277,475.65
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	18,209,825.39
Kentucky's share of the market value of the stock and par value of the bonds on the basis of the proportion the gross earnings in Kentucky bears to the gross earnings of the entire system (37.94%)	74,130,548.66
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	22,394,838.75

VALUATION No. 3.

The highest market value of the stock as of June 30, 1905, based on the highest quotation on that date on the New York Stock Exchange ($149.75 per share)	$ 89,850,000.00	
The par value of the bonds	114,440,500.00	
Total of highest market value of stock on June 30, 1905, and par value of bonds		$204,290,500.00
Kentucky's share of this value based on the mileage operated (30.85%)		63,023,619.25
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)		19,039,435.37
Kentucky's share of the highest market value of the stock on June 30, 1905, and par value of the bonds on the basis of the proportion the gross earnings in Kentucky bear to the gross earnings of the entire system (37.94%)		77,507,815.70

The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)		23,415,111.12

VALUATION No. 4.

Cost of all the railroads of the Louisville & Nashville Railroad Company in Kentucky, as shown by the books		$57,097,232.53
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The value of equipment in Kentucky based on the mileage made by the different classes of equipment (locomotives, passenger cars, and freight cars), over the lines in Kentucky as compared with the total mileage made by such equipment over the entire system		$10,826,668.77
Total value based on cost of road and value of equipment		$67,923,901.30
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)		20,519,810.58

VALUATION No. 5.

The value of the railroads of the Louisville and Nashville Railroad Company in Kentucky based on the cost of reproduction	$59,772,816.04	
The value of equipment in Kentucky based on the mileage made over the lines in Kentucky as compared with the mileage made by the different classes of equipment over the lines of the entire system	10,826,668.77	
Total value based on cost of reproduction		$70,599,484.81
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)		21,328,104.36

VALUATION No. 6.

Kentucky's share of the par value of the capital stock of the Louisville & Nashville Railroad Company ($60,000,000) on the basis the operated mileage in that State bears to the operated mileage of the entire system (30.85%)	$18,510,000.00	
Kentucky's share of the par value of the bonds secured by mortgages on the lines in that State and of other bonds equitably apportioned to those lines....	48,966,691.53	
Total of Kentucky's share of stock and bonds on this basis		$67,476,691.53
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)		20,384,708.51

53 XV.

Complainant states that the net earnings on intrastate traffic in Kentucky, as hereinabove set forth, are ascertained by deducting from the gross earnings from such traffic only the average percentage which the operating expenses and taxes (69.16% plus 3.42% or 72.58%) are of the entire gross earnings from all traffic in that State, when in fact the percentage of operating expenses for local or intrastate business in Kentucky is and would exceed the percentage of operating expenses on all business by at least twenty-five (25) per cent. The fact of this extra cost of local or intrastate business was established by the evidence introduced in the proceeding before said Commission, the percentage in excess of the percentage of operating expenses on all business having been variously estimated at from ten (10) to twenty-five (25) per cent., the latter percentage having been testified to by several competent expert witnesses introduced in behalf of this complainant, without any testimony to the contrary, or tending to prove the incorrectness of that estimate.

Complainant states that for every $1.00 earned by it on intrastate traffic in Kentucky for the fiscal year ended June 30, 1905, it cost complainant, at least, ninety-seven and fifty-eight hundredths (97.58) cents, leaving its net earnings only two and forty-two hundredths (2.42) cents; and its net earnings on such traffic in that State were not more on the dollar in prior years, nor have they been since.

Complainant states that the legal rate of interest in the State of Kentucky is six (6) per cent. per annum, but on account of
54 the extra hazards of the railroad business complainant is entitled to net earnings or an income greater than six (6) per

cent., or at least (8) per cent. per annum, which would not be more than a just and reasonable return on the fair value of its investments or railroad properties in Kentucky devoted to, used or employed for the transportation of intrastate traffic. On this fair value of its investments or properties so devoted, used or employed in Kentucky, ascertained by either of the methods stated in Part XIV hereof, complainant did not for the fiscal year ended June 30, 1905, for any prior fiscal year, or for the last fiscal year, under its existing rates, receive, after deducting operating expenses and taxes, a fair, just or reasonable annual return or income, or as much as six (6) per cent. per annum, much less eight (8) per cent. per annum, to which it was and is reasonably entitled. But, notwithstanding these facts, the said Commission in reaching its conclusions as embodied in its opinion and order reducing complainant's rates, as aforesaid, and thus reducing its receipts on intrastate freight traffic to the extent, at least, of $150,673.74 per annum, erroneously held that four (4) per cent. per annum was and is a fair and just return on the value of complainant's railroad properties devoted to intrastate traffic in Kentucky, and, on that ground and other unwarranted assumptions, promulgated its said order reducing complainant's rates as aforesaid.

XVI.

The Commission in its said opinion discards a certain plan of proof in the case of Smyth *vs.* Ames, 169 U. S. 466, known as the Nebraska case, used for arriving at the cost of doing intrastate business. The entire reasoning of the Commission with respect to the plan there followed is fallacious. The emergency which
55 demanded the adoption of some plan similar to that used in the Nebraska case was substantially this:

Each railroad was able to furnish the total amount of Kentucky revenue and was able to divide this into two elements, the intrastate and interstate business. Some of the railroads were able to furnish the total amount of expenses for carrying on their Kentucky business, both intrastate and interstate; but all were unable to divide from their books and accounts this total expense into the two accounts, one to be applied strictly to intrastate business and the other to interstate business. All of them, however, insisted that on an average it cost more to earn 100 cents in intrastate business than it did to earn the same amount in interstate business. This may be illustrated as follows: If it requires an outlay of 70 cents on an average to earn 100 cents of general revenue, then it will take more than 70 cents on an average to earn 100 cents on strictly intrastate revenue. The Louisville & Nashville Railroad Company took the position as to its business that on an average it would require 25 cents more to earn 100 cents of intrastate revenue than it would to earn 100 cents of general revenue, both intrastate and interstate. It is true this idea was expressed by per cent., that is, for illustration, the percentage of general expenses to general revenue as shown by that company was 69.16, and to this they added 25 per cent. (omitting the question of taxes) which would make the percentage of expenses for transporting intrastate business to the revenue from such business, 94.16. This was the plan used in the Nebraska case, the

figures of course being different. The Kentucky Commission assails this plan in the following language:

"The fallacy of these claims lies in the fact that 69.16 per
56 "cent. does not stand for total cost at all, nor for any part of
"the cost. The factor 69.16 simply represents the relation
"between the total cost and total earnings expressed in dollars and
"cents. The cost and the earnings may both be high or both be
"low, and yet the same relation may exist. The cost of doing a
"particular part of the whole traffic may be more than the average
"cost, and yet the per cent. of that cost to high earnings on that
"particular traffic may be less than the percentage of the whole cost
"to the gross earnings. The expense or cost to the carrier of a
"given amount of transportation has no necessary connection with
"the earnings or profits derived from that transportation. Since
"the cost, either total or average, is ascertainable solely from its
"own elements, it can never be expressed by percentage."

What the Commission means by saying that the factor 69.16 does not represent in any way the cost of doing business is past understanding. It certainly means that for every 100 cents earned there was an expenditure of 69.16 cents, or, to put it in another form, it means that for every 69.16 cents expenditure there was a gross earning of 100 cents and a net earning of 30.84 cents. So much for the proposition advanced by the Commission, "that 69.16 per cent. does not stand for total cost at all, nor for any part of the cost," and "the expense or cost to the carrier of a given amount of transportation has no necessary connection with the earnings or profits derived from that transportation." Following the paragraph which has been above quoted from the opinion, the Commission takes a concrete example to illustrate the alleged fallacy of the contention of the railroads. They say:

"Suppose a line of road carried for a given period only
57 "three tons of freight and no passengers, its total operating
"charge being applicable to the earnings of those three tons,
"and assume the following costs and charges for each ton:

"A. One ton, cost.....	$0.70	Earnings or charge.....	$0.90
"B. One ton, cost.....	.60	Earnings or charge.....	.80
"C. One ton, cost.....	.20	Earnings or charge.....	.80
"Total three tons cost.	$1.50	Total earnings or charges.	$2.50

"The percentage of the operating expenses, or total cost, to the "total or gross earnings would be ($1.50 divided by $2.50) 60 per "cent.

"The general or average cost would be ($1.50 divided by 3) 50 "cents per ton. Now suppose it is desired to state by percentage "how much more 'ton A' cost than the general average cost of 50 "cents. Knowing the cost of 'ton A' to be 70 cents and the general "cost to be 50 cents, it is readily found that the difference is 40 per "cent. It can, therefore, be claimed, and by correct mathematics "demonstrated, that 'ton A' cost the carrier to transport it, 40 per "cent. more than the general average cost.

"Now if it is desired to state by percentage the cost of 'ton A' (70

"cents) to the earnings or charge for the transportation (90 cents), "the percentage is easily found by dividing 70 cents by 90 cents, "with a result of 77.77 per cent., or 17.77 per cent. in excess of the "60 per cent. relation of total expenses to gross earnings.

"In the same way, and by the same rule of computation, 'ton C.' "which cost the carrier only 20 cents to transport and yields an "earning charge of 80 cents, shows a percentage of cost to the earn- "ings charge of only 25 per cent., or 35 per cent. less than the 60 "per cent. relation of total expenses to gross earnings.

58 "If instead of ascertaining the true percentage of cost to "the earning charge of 'ton A' to be 77.77 per cent., a claim "is set up that 'ton A' costs 40 per cent. more *than the general or* "average cost, and should on that account be added to the per- "centage of total operating expenses to gross earnings (60 per cent.), "the addition makes the claimed cost of 'ton A' (40 per cent. plus "60 per cent.) 100 per cent., and consequently that 'ton A' was "carried without any profit whatever."

It should be stated that the railroads did not follow in their calculations any plan similar in the remotest degree to that used by the Commission in the above quotation.

In the first place, the question involved in the percentage plan used by the railroads is simply this: In earning 100 cents, how many cents are expended? But the Commission says: "The general average cost would be ($1.50 divided by 3) 50 cents per ton." But the expenditure of 50 cents does not produce 100 cents in earnings, but only 83⅓ cents. For an average expenditure of 60 cents there is an earning of 100 cents.

But this is not the only erroneous departure from the railroads' insistence. The Commission says:

"Now suppose it is desired to state by percentage how much more "'ton A' cost than the general average cost of 50 cents. Knowing "the cost of 'ton A' to be 70 cents, and the general cost to be 50 "cents, it is readily found that the difference is 40 per cent. It "can, therefore, be claimed, and by correct mathematics demon- "strated, that 'ton A' cost the carrier to transport it, 40 per cent. "more than the general average cost."

59 The railroads never followed any such plan. The Commission arrives at the 40 per cent. regardless of the basis of earnings, 100 cents, which is the only basis upon which the railroads ever pitched their contention. The calculation by which the cost of "ton A" is said to be 40 per cent. more than the general cost has absolutely ignored the question of earnings, and is based upon the cost per ton regardless of revenue per ton, and yet the 40 per cent. is added to the 60 per cent., which was arrived at wholly upon the proposition of percentage of cost to earnings. The result makes 100 per cent.; that is, they say there was no profit in the business. In adding 40 per cent. to the 60 per cent. the Commission has really, as it were, added two cows and three horses and obtained a result of five sheep for, as stated, these two percentages were arrived at upon entirely different bases.

The fallacy of the argument of the Commission on this point also appears from the following analysis: As to the general average busi-

ness, there is an expenditure of 60 cents to produce earnings of 100 cents. If this proposition should be applied to traffic denominated by "ton A," there would be an expenditure of 54 cents to earn 90 cents, but the actual expenditure is 70 cents, a difference of 16 cents. Now what per cent. of 90 cents is 16 cents? Manifestly 17.77 per cent., which added to the 60 per cent. makes 77.77 per cent., a thoroughly and wholly consistent result.

Applying the concrete example employed by the Commission to the actual contention made by the railroads before that body, their statement is as follows:

It is known that an average expenditure of 60 cents is required to produce earnings of *100 cents in the general business.* It
60 is known that the revenue from the traffic denominated by "ton A" is 90 cents. It is further known that it required an expenditure of 17.77 cents more to produce earnings of 100 cents from the traffic denominated by "ton A" than it does to produce 100 cents in the general business. Therefore, it takes 77.77 cents to produce earnings of 100 cents in the traffic denominated by "ton A." It follows, consequently, that the cost of earning the 90 cents from "ton A" traffic would be 90 multiplied by 77.77 per cent., or 70 cents. Or, to apply the figures to round numbers, in the neighborhood of those used by the Louisville & Nashville Railroad Company, we shall say that the entire earnings from Kentucky traffic amounted to $14,000,000, of which $10,000,000 were interstate and $4,000,000 were intrastate earnings. The total expense of transacting all the business was $9,800,000, that is, for an average expenditure of 70 cents there was an earning of 100 cents. Now, if it be estimated that it costs 25 cents more to earn 100 cents in purely intrastate traffic than it does to earn 100 cents in the general business it would require an average expenditure of 95 cents to earn 100 cents. But the actual earnings from intrastate traffic amounted to $4,000,000, and, therefore, it cost to earn this revenue $3,800,000, or there was a profit of $200,000. If it be desired then to calculate the cost of doing the interstate business alone, we substract $3,800,000 from $9,800,000, the total expense, and obtain $6,000,000 as the total expense of that traffic, or an average expense of 60 cents for every 100 cents of revenue. There is no fallacy in these calculations. There is, of course, an assumption (but based on evidence) that intrastate traffic costs more than the general business.

61 XVII.

In arriving at the fair value of complainant's railroad properties, including equipment, in Kentucky, said Commission apparently accepted and treated as correct the valuation thereof resulting from the estimates and testimony of complainant's Consulting Engineer as to the cost of reproducing all such properties, outside of equipment, to wit, $59,772,816.04, and the testimony of complainant's Assistant Comptroller as to the value of the proportion of equipment belonging to Kentucky, to wit, $10,826,668.77, making in all $70,599,484.81 (erroneously stated by said Commission to be $70,530,727.91.) But said Commission did not apportion this virtually con-

ceded value of complainant's railroad properties in Kentucky, (1) so as to find separately the value thereof devoted to intrastate passenger and freight traffic, and the value thereof devoted to interstate passenger and freight traffic, nor (2) so as to find separately the value thereof devoted to intrastate passenger traffic, and the value thereof devoted to intrastate freight traffic. Instead of apportioning the value of complainant's properties in Kentucky according to gross earnings in that State from each kind of traffic, which is, and would have been, the fairest and most correct method of apportionment, the defendants, constituting said Commission, without reason or precedent, but after an erroneous and inequitable plan of their own invention, undertook to fix and make up what is conceived to be
62 a fair "annual allowance" to complainant upon the valuation aforesaid of its railroad properties or capital in Kentucky, as follows:

They took, on account of funded debt, two-thirds of such capital ($70,530,727.91) or $47,020,485,28, at four and twenty-five hundredths (4.25) per cent. (which equaled two and eighty-three hundredths (2.83) per cent. on the entire capital....	$1,998,370.62
On account of stock, one-third of such capital or $23,510,242.63, at four and thirty hundredths (4.30) per cent. which equaled one and forty-three hundredths (1.43) per cent. of the entire capital.	1,010,940.43
On account of accumulation and maintenance of surplus the whole capital at one and thirty hundredths (1.30) per cent.....	916,899.46
Total at five and fifty-six hundredths (5.56) per cent.	$3,926,210.51

The said Commission then proceeded to declare that "an allowance of five and sixty hundredths (5.60) per cent. on account of charges upon capital is extremely liberal," and applying this percentage upon complainant's "estimate of actual valuation of its Kentucky property, gives an annual charge, on account of valuation, amounting to $4,450,488.75, including taxes which are stated to be $500,752.75." After determining that this annual allowance of (in round figures) $4,450,500 was all complainant was entitled to earn on its investments in Kentucky, said Commission, claiming it was guided by no precedent, decided to apportion the said annual allowance upon the basis of operating expenses. The total operating expenses in doing all business, intrastate and interstate, passenger and freight traffic, in Kentucky for the fiscal year ended June 30, 1905, amounted to $10,127,125.78, not including taxes, which were $500,752.75. These operating expenses and taxes were divided or apportioned between passenger and freight traffic, as shown by the evidence and figures furnished by this complainant's Assistant Comptroller to
63 said Commission at its request in the proceeding aforesaid, as follows:

Amount of operating expenses chargeable to passenger traffic	$2,800,208.30
Amount of operating expenses chargeable to freight traffic	7,827,670.23
Total	$10,627,878.23
The total freight earnings were	10,869,989.80
The total operating expenses and taxes chargeable to freight were, as above	7,827,670.23
This latter sum is 72.01% of the amount of freight earnings.	
The gross amount of intrastate freight earnings was	2,552,273.62
From this sum 72.01% must be deducted for operating expenses and taxes, assuming the percentage of cost of conducting the intrastate business was no more than the percentage for doing the entire freight business	1,837,892.23
Amount of net earnings on intrastate freight	$714,381.39

The said Commission in its order aforesaid allows only $6,535,-753.09 as operating expenses chargeable to freight traffic, which sum it reaches, without attacking the figures showing such expenses and taxes to be, as above stated, $7,827,670.23, by arbitrarily and without reason deducting from the latter sum the following items, to wit:

Amount for improvements of ways and structures	$326,798.25
Amount for improvement of equipment	596,303.27
Proportion of taxes chargeable to freight traffic	368,815.62
Total	$1,291,917.14

This latter sum is thus erroneously excluded by said Commission from the amount of operating expenses and taxes chargeable to freight traffic. Having reduced the amount of legitimate operating expenses and taxes chargeable to freight traffic to $6,535,753.09, the said Commission, by a process of its own, divides this latter sum between expenses for haulage services and expenses other than for haulage, allowing for the former $5,014,823.22, and for the
64 latter $1,520,929.87. It assumes erroneously and arbitrarily that the alleged expenses for services other than haulage can be arrived at on a ton basis, that is, by dividing the sum allowed therefor by the total number of tons and thus getting the cost per ton, then dividing this result by the number of miles in the average haul of intrastate freight to obtain the cost per ton per mile for services other than haulage. The said Commission then takes the amount allowed for haulage, and divides this sum by the total ton miles to arrive at the rate per ton per mile for haulage, and adds together the two rates per ton per mile thus found, and gets the rate per ton per mile, assumed by it, for intrastate freight, to wit: .5543 cents. Instead of using the rate per ton per mile thus found and

multiplying it by the ton mile to find the total cost it allows for doing intrastate business, the said Commission takes the average amount per ton it found, to wit: .1625225, and multiplies that by the number of tons of intrastate freight hauled, 1,993,182, and then takes the ton miles of the intrastate freight, 195,250,701, and multiplies that by .003883423, the rate per ton per mile assumed by it for haulage. To the two sums thus found it adds $152,845.35, which it alleges is on account of permanent improvements paid out of income and thus charged against intrastate freight, which makes $1,235,023, which said Commission allows as operating expenses chargeable against intrastate freight, instead of $1,837,892, which should have been allowed for operating expenses and taxes chargeable against intrastate freight. In assuming that the expenses for haulage can be properly divided on a ton mile basis, and the expenses for services other than haulage can be properly divided on a ton basis, the said Commission's action is entirely arbitrary, and
65 assumes something that is unfounded and wide of the truth. It loses sight entirely of the fact that on intrastate traffic the haul is comparatively short and of the much greater dead weight per ton of paying freight which must always be carried to take care of the short haul business. While some intrastate business is long haul, and some intrastate business is short haul, yet, taking it as a whole, the greater part of the intrastate business is short haul and the greater part of the interstate business is long haul. It is, therefore, reasonably correct to say that wholesale methods can be employed in handling the interstate business, while retail methods must be employed in handling the intrastate business. On an average it will cost three times as much per mile to carry a ton of intrastate freight as it will to carry a ton of interstate freight, as in the through trains which are principally devoted to the carriage of interstate freight there will be on an average two or three times as many paying tons of freight as there are in a local train which is usually employed in handling the short haul intrastate traffic, and, in addition, the through freight (the long haul freight) will make much more mileage per ton than will the local freight. The greater density of the interstate traffic per train is the principal cause of making the cost per ton of intrastate business several times as much as the cost per ton of the interstate business. This feature is absolutely ignored in said Commission's order, so far as haulage is concerned, as it assumes that the cost per ton per mile is the same for intrastate freight as for interstate freight, contrary to all the evidence introduced before said Commission in the investigation aforesaid, and so far as the services other than haulage is concerned the said Commission assumes that the cost per ton is the same for interstate freight as for intrastate freight, both of which assumptions are manifestly incorrect.

66 XVIII.

The said Commission, in pursuing its said unique and fallacious plan for ascertaining the value of complainant's investments in Kentucky, on which it is entitled to receive a fair and just return

from intrastate freight, in its opinion aforesaid, states that the total annual charge or allowance of $4,450,500 is 43.95 % of $10,127,126, the total operating expenses (exclusive of taxes) for all traffic in that State for the year ended June 30, 1905.

The share of these operating expenses chargeable to freight traffic alone, including its shares of taxes, is	$7,827,670.23
From this sum said Commission erroneously and without reason deducted the three amounts, viz: For improvements of ways and structures, improvement of equipment, and proportion of taxes which should be borne by freight traffic	1,291,917.14
Leaving operating expenses chargeable to freight, exclusive of its share of taxes	$6,535,753.09
After reaching this result, said Commission by the erroneous methods referred to in Part XVII hereof, finds that the operating expenses chargeable to intrastate freight is only	1,235,023.00
On this latter sum that class of traffic is allowed 43.95% as its share of the annual charge or allowance fixed by said Commission ($4,450,500)	542,744.00
The gross earnings on intrastate freight were	2,552,273.62
The two sums found for operating expenses ($1,235,023) and for the share of intrastate freight in the annual allowance for income or a fair return on complainant's investments devoted to that class of traffic ($542,744) aggregate	1,777,767.00
And when deducted leave what said Commission declares is "excess of just and reasonable rates"	$774,506.62
The sum allowed by said Commission ($1,235,023) for total operating expenses against total earnings on intrastate freight traffic ($2,552,273.62) shows only	48.39%

67 This is an unprecedentedly low percentage of operating expenses to gross earnings and could not have been reached otherwise than by fallacious reasoning and a perversion of the facts. This low percentage of operating expenses to gross earnings was found by said Commission on that class of traffic, the transportation of which is more expensive to railroad carriers than any other kind of traffic. It is 20.78% less than the average percentage (69.16) of operating expenses to gross earnings from all traffic carried by complainant in Kentucky for the same fiscal year. The percentage of operating expenses (excluding taxes) to gross earnings from all traffic on all the railroads in the United States for the fiscal year ended June 30, 1904, as reported by the interstate Commerce Commission, was 67.79; and on all the railroads in Group V, established by that Commission, embracing the States of Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, and

that portion of Louisiana east of the Mississippi River, for the same year (excluding taxes) such percentage was 70.66.

Again for the year ended June 30, 1905, on all the railroads in the United States (excluding taxes) such percentage, according to the same authority, was 66.74. Furthermore, in the calculation by said Commission equally fallacious and unreasonable results are obtained with respect to the operating expenses chargeable to interstate freight.

The total freight earnings, intrastate and interstate, were	$10,869,989.80
The operating expenses found by said Commission to be chargeable to freight earnings, intrastate and interstate, amounted to	6,535,753.09
Thus the percentage of operating expenses (exclusive of taxes) to all freight earnings is erroneously shown to be only	60.13%
Yet the evidence in said proceeding showed without contradiction the percentage of operating expenses to freight earnings was very considerably greater than to passenger earnings. Again, taking the low figure found by said Commission for operating expenses chargeable to all freight earnings.	6,535,753.09
And deduct therefrom the amount found by said Commission chargeable to intrastate freight earnings	1,235,023.00
Leaves of operating expenses admittedly chargeable to intrastate freight earnings	$5,300,730.09

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This sum represents the operating expenses chargeable against gross interstate freight earnings, amounting to	$8,317,716.26
According to said Commission the percentage which the operating expenses ($5,300,730) bears to the gross interstate freight earnings is	63.73%
The percentage of operating expenses to gross earnings from interstate freight, under said Commission's erroneous findings, is, therefore, 15.34% greater than the percentage of operating expenses to gross earnings from intrastate freight, notwithstanding all the evidence introduced before said Commission showed that the percentage of operating expenses to gross earnings from intrastate freight was from 10% to 25% greater than the percentage of operating expenses to gross earnings from interstate freight or from all traffic. On the amount of the operating expenses chargeable against interstate freight, according to the theory adopted by said Commission, a sum equal to 43.95% thereof should be allowed to that traffic as its share of the annual allowance for income or a fair return	2,329,670.87

This latter sum apportioned to interstate freight is about four and a third (4⅓) times the amount ($542,744) apportioned to intrastate freight, although the amount of gross earnings from the former is only about three and a third (3⅓) times the latter. But these two shares of the so-called "annual allowance" for income or fair return on the value of complainant's properties or investments in Kentucky devoted to freight traffic, make only	2,872,414.00
The gross earnings for passenger traffic (intrastate and interstate, including all earnings other than freight) were	3,773,540.03
The total amount of the annual allowance aforesaid is	4,450,500.00
Of this annual allowance the share going to passenger traffic, both intrastate and interstate, is the remainder after deducting the shares apportioned to both kinds of freight traffic as above	1,578,086.00

This latter sum apportioned to passenger traffic is nearly three times the amount ($542,744) apportioned to intrastate freight, although the amount of the former is only one and a half times the amount of the latter.

Instead of reaching the absurd results and conclusions above set forth, complainant was entitled (under said Commission's plan of apportioning its annual allowance for income or fair return)
69 to have its gross earnings from intrastate freight and operating expenses chargeable thereto, stated as follows:

Amount of gross earnings on intrastate freight		$2,552,273.62
Operating expenses chargeable to freight earnings and taxes (72.01%), assuming the percentage of cost of doing the intrastate freight business is no greater than the percentage for doing the entire freight business in Kentucky	$1,837,892.23	
The share of intrastate freight of the annual allowance fixed by said Commission for income or fair return, being 43.95% of above amount for operating expenses and taxes, $807,753.64, less proportion of taxes, or 3.42% on $2,552,273.62 ($87,287.75)	720,465.88	
Total		2,558,358.11

Deficit in income or fair return	6,084.49
To this should be added the amount of the annual reduction ordered by said Commission on intrastate freight	150,673.74
Total amount deficit on intrastate freight..	$156,758.23

XIX.

Complainant states that in its said opinion the Commission incorrectly states that the amount allowed by it for operating expenses ($1,235,023) chargeable to gross earnings from intrastate freight includes "a liberal allowance (more than 13¼% of reported operating expenses), out of which to make permanent improvements to the property." This percentage is over-estimated by the Commission. Besides, the Commission wrongfully excluded from freight operating expenses, as stated in Part XVII hereof, $326,798.25 for improvements of ways and structures, and $596,303.27 for improvement of equipment, aggregating $923,101.52.

Complainant further states the Commission in its said opinion asserts without any foundation in fact, and in the face
70 of positive evidence to the contrary, that in operating expenses charged to gross earnings in Kentucky, complainant wrongfully included "a considerable sum, amounting to $259,842.46 in the statement of salaries paid to general officers and general office clerks." In complainant's report to the Commission there is shown for the fiscal year ended June 30, 1905, a total yearly compensation for general officers, other officers, and general office clerks of $529,829.52. Of this total sum only the sum of $222,669.06 was charged to operating expenses of Kentucky lines, which was the fair proportion chargeable to those lines of said general expenses.

XX.

Complainant states that the defendants, constituting said Commission, in their opinion and order promulgated on July 20, 1906, as aforesaid, assumed the power, which they did not possess under the provisions of the McChord Act, or any other statute of Kentucky, to make and fix a classification of freight traffic for and to be observed by complainant and the other railroad carriers operating lines in that State, and by their said order attempted to make, fix and adopt such classification, and charged and interfered with the rules and practices of such railroad carriers, without authority of law to do so, and their action in that respect is null and void.

Furthermore, the defendants, constituting said Commission, by its said order, without authority of law, either under said McChord Act or any other statute of the State of Kentucky, assumed the power and undertook to make, publish and establish a schedule of maximum rates on freight traffic for and to be observed by com-
71 plainant and the other railroad carriers operating lines in that State, and their action in that respect is likewise null and void.

The defendants, constituting said Commission, possess no power under the McChord Act to make, publish and establish a schedule of maximum rates on freight traffic, or to require complainant or the other railroad carriers operating lines in Kentucky to observe the same. Their power to make and fix a rate, if any they have at all, under said Act (and complainant avers they have none thereunder) is limited to a case where upon complaint or their own motion, after notice and investigation, they find an existing rate is extortionate, when they may then, in lieu of the particular rate held by them to be extortionate, make, fix and name a rate which they shall determine to be a just and reasonable one for like services thereafter rendered.

XXI.

Complainant states that the reduction in its rates ordered by the Commission, if put into effect, will directly and necessarily interfere with, affect and reduce complainant's existing rates on interstate freight shipped to and from stations on its lines in Kentucky to and from stations on its lines and other lines outside of Kentucky, as the full amount of complainant's existing local rates in Kentucky enter into and form a part, in most instances, of the existing through rates on such interstate shipments of freight belonging to the same classes. The said order made by the Commission, were it to become effective, would not only reduce complainant's local rates in Kentucky and cause an annual loss to complainant on intrastate freight of at least $150,673.74, but would directly and necessarily result in reducing complainant's through rates on interstate ship-
72 ments of freight, and cause an annual loss to complainant thereon of not less than $50,000. Thus the total reduction in the revenues of complainant directly resulting from the order aforesaid, should the same be put into effect, would not be less than $200,000 per annum. Complainant states that the change in rates and charges now in effect in Kentucky directed by the Commission in its order aforesaid, would necessarily result in the disturbance, alteration and reduction of interstate rates now and for a long time established on complainant's lines, as well as the lines of other interstate railroad carriers operating lines in Kentucky and other States, and to put into effect said order would be, to that extent, a direct regulation of interstate commerce and in violation of clause three (3), section eight (8), article one (1) of the Constitution of the United States, which vests in the Congress of the United States alone the power to regulate interstate commerce, and this power has been exercised in the act to amend the "Act to regulate commerce," approved June 29, 1906, wherein the power to regulate and fix rates to be charged, collected or received by railroad carriers on interstate freight was delegated to the Interstate Commerce Commission, and since the approval of said Act of Congress neither the State of Kentucky nor the Kentucky Railroad Commission has any power or authority to regulate or fix rates to be charged, collected or received by railroad carriers so as to directly or indirectly regulate, disturb, interfere with or fix the rates of such carriers or interstate freight or traffic, or to impose any orders, rules, charges or regulations, the necessary result of the enforcement of which would be to affect and

regulate commerce between the State of Kentucky and other States, or conflict with the exercise of the powers delegated by the Congress to the Interstate Commerce Commission in the act aforesaid. Complainant states that the order of the Commission promulgated, as it was, since the passage and approval of said Act of Congress on June 29, 1906, is in conflict therewith and violates the commerce clause of the Constitution of the United States, the benefit and protection of which complainant relies on and invokes in the premises.

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XXII.

Complainant states that its existing rates and charges in effect on its several lines in the State of Kentucky and applicable to its intrastate freight business, instead of being extortionate, are not higher than is just and reasonable, whether considered with respect to the value of its property or investments used in the public service or devoted to such traffic, or with respect to the value of the services rendered to the shippers or public generally; and complainant states it has the lawful right, as inherent to its business as a common carrier of freight and passenger, to charge and receive for the services rendered by it in the State of Kentucky, just and reasonable rates, which right to charge and receive such just and reasonable rates is a property right that neither the State of Kentucky nor any governmental agency thereof can take from it or interfere with; and complainant states that the Commission's order, if permitted to be put in force, will deprive it of its said property right, without due process of law in violation of section one (1) of the Fourteenth Amendment to the Constitution of the United States.

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XXIII.

Complainant states that the fiscal years ended June 30, 1904, June 30, 1905, and June 30, 1906, were the most prosperous years of any during the period it has operated its lines in the State of Kentucky, and yet during neither of said years did it receive from its existing rates on intrastate freight as much as a fair or just return on the value of its investments in that State devoted to the service of carrying that traffic; and to put into effect the Commission's order providing reduced rates would not in any wise result in materially increasing the volume of intrastate freight over complainant's lines in Kentucky or its receipts from such traffic, and complainant can not, therefore, reasonably expect any material increase in its gross earnings on such traffic upon its lines in that State to offset the loss it will necessarily sustain by reason of such reduction in its rates. Complainant states that to require it to operate its railroad properties in Kentucky for so small a return upon their actual value as will necessarily result from the enforcement of said order is and will be a practical confiscation of the same and the use thereof; it will deprive complainant of its said properties devoted to the carrying of intrastate freight in Kentucky, without due process of law; it will operate to take its said properties for public use without just compensation; and it will deny to complainant the equal protection of the laws, in violation of the provisions of the Constitution of the

United States, herein above referred to, and especially articles five (5) and eight (8) thereof, and section one (1) of the Fourteenth Amendment thereto.

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XXIV.

Complainant states that its officers, agents and employés during the time it has operated and controlled its several lines of railroad in Kentucky have managed the same honestly, skillfully and economically; that they have used all reasonable efforts to procure passengers, mail, express, freight and other intrastate traffic for transportation over the whole and every part of its said lines; that they have charged and received for the transportation of intrastate freight and passenger traffic, and for mail, express and other intrastate traffic over its several lines in Kentucky rates, which, though just and reasonably low, were as high as were allowed by law or by competitive conditions and other circumstances affecting such traffic on each of its said lines.

Complainant states that its gross earnings on each of its lines in Kentucky have been as large as was possible to make them, under the existing just and reasonably low rates, and under the existing competitive or other conditions and circumstances; that the taxes on its said railroad properties in Kentucky have been only such as were claimed to be lawfully levied and assessed, and were paid to maintain the operation of its said railroad properties; that the rate of interest on its mortgage bonds resting as liens on said properties in Kentucky was as low as it was possible to make it; that the operating and other expenses have been kept down as low as possible, having in view the operation of trains and the proper maintenance and efficiency of said properties for the public service in which they were employed; that the supplies, material and labor used for those purposes were procured as cheaply as possible; and that the

76 amount paid by it for general officers' salaries and for employés' wages on account of its several lines in Kentucky have been as low as practicable, considering the necessity for employing competent officers and employés.

XXV.

Complainant is advised, insists and avers that the system of rates heretofore and now being charged and collected by it in the operation of its several lines in Kentucky, for the transportation of freight between points wholly within that State, were and are just and reasonable in and of themselves and for the service performed, and the same with careful, skillful and economical management will not hereafter produce (as they have not heretofore produced) such an amount of revenue as will while being just and reasonable to shippers and the public, yield more than a fair or just return upon the actual value of the railroad properties, rights and franchises situated in that State and devoted to the service of such shippers or the public in carrying intrastate traffic; and the defendants, constituting the Commission, in their order aforesaid attempting to reduce the freight rates on complainant's lines in Kentucky between points in that State, ought not to be sustained, but should their said order

be allowed to go into force and effect, complainant can not earn sufficient revenue on its railroad properties in Kentucky devoted to the transportation of intrastate freight to yield a fair or just return upon their actual value, and the defendants, constituting the Commission, will, unless enjoined and restrained from so doing by this court, at the expiration of ten days from July 20, 1906, when their said order was mailed to and received by complainant's said
77 District Attorney, claim that said order has become final and conclusive, and will compel or undertake to compel complainant to submit to said unwarranted and ruinous reduction in its rates, as set forth therein, and complainant will be thereby rendered unable not only to earn a fair or just return on the value of its investments or its railroad properties employed and used for the transportation of intrastate freight in Kentucky, but from the operation of its said railroad properties will be unable to pay operating expenses, taxes, cost of betterments, improvements and renewals, and interest on its bonded indebtedness.

XXVI.

Complainant further states in the operation of its lines in Kentucky and in the transportation of freight thereon between points in that State, should the Commission's order be put into force and effect, it will be restricted to charging and collecting no higher rates than those which the Commission has prescribed in its said order, and however unreasonably low and unjust the rates so prescribed are, complainant must either accept them, with or without protest, or act at its peril, if it dares to charge or collect any higher rates, and, in the hundreds and thousands of prosecutions by indictment that may and will be instigated and recommended by the Commission against complainant, its officers, agents and employés, to recover the excessive fines and penalties imposed by the McChord Act, the aforesaid schedule of rates made and fixed by the Commission, must and will be taken by the court having criminal jurisdiction of the public offenses charged, as final and conclusive that the rates prescribed therein are just and reasonable, and that any higher rates
78 charged or collected by complainant are unjust, unreasonable and extortionate, and, therefore, in violation of law or the provisions of the McChord Act. In other words, in all such prosecutions the Commonwealth of Kentucky will only have to produce the Commission's schedule of rates; prove that it was mailed to complainant, or one of its officers, agents or employees; and that the rate charged, collected or received thereafter by complainant, or one of its officers, agents or employees, as the case may be, on any line of complainant in Kentucky between points in that State, was in excess of that fixed in the Commission's schedule of rates; and without more, conviction would certainly and inevitably follow.

Complainant states that the question as to what is a just, reasonable or non-confiscatory rate to be charged or collected for the transportation of freight or other traffic is an exceedingly difficult and complicated one; a question for the consideration of which a jury is wholly unsuited; a question which requires for its determination

an inquiry into numerous and technical facts, to prove the existence of which necessitates the introduction of many witnesses, and among them railroad officials, agents and employees, who are engaged with duties of great importance to the public, the proper discharge of which requires the almost constant attention of such officials, agents and employees in the offices where their books, accounts, records and papers are kept.

Complainant states that if in the operation of its lines in Kentucky it fails or refuses to accept and put into force and effect said reduction in its rates, as prescribed in the Commission's order, the defendants will cause to be instituted a multitude of prosecutions by indictment against complainant, its officers, agents and employees,

79 through the Grand Jury and Commonwealth's attorney of each of the fifty-four (54) counties in that State, through or into which its lines run, to recover the excessive fines and penalties imposed by the McChord Act, for violations thereof; and complainant would be subjected to great expense in the loss of time of its officers, agents and employees in giving the necessary attention to the defense of such prosecutions.

Complainant states in the multiplicity of such legal proceedings, which it seeks to avoid, the same questions would be involved, without any opportunity for complainant, or its officers, agents or employees, as the case may be, to make a defense or show by evidence the unreasonableness or injustice of the rates fixed by the Commission, and the merits of any defense justifying a failure or refusal to obey said order can not be tried in a court at law, or court of criminal jurisdiction, or be fully and finally settled and determined otherwise than in a court of equity.

Complainant states that the defendants are threatening to carry out their said order reducing its rates by recommending and procuring numerous indictments against complainant, its officers, agents and employés, on and after July 29, 1906, to recover the fines and penalties prescribed by the McChord Act, and will do so unless immediately restrained and enjoined by this court from doing so. Complainant states it is not bound by nor does it intend to obey said order or to put into force and effect the rates made and fixed by the Commission therein, and will not do so at any time hereafter, unless denied relief therefrom by the court having final jurisdiction of this cause.

80 XXVII.

Complainant further states that this is a suit in equity, of a civil nature; that the matter in dispute far exceeds, exclusive of interest and costs, the sum or value of Two Thousand ($2,000) Dollars; that this cause is a suit arising under the Constitution of the United States, to wit: Section four (4), Article four (4), Articles five (5) and eight (8), and Section one (1) of Article fourteen (14) of the amendments to said Constitution.

In consideration whereof and for as much as complainant is remediless in the premises at law, or under the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the

end that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again herein repeated and they were thereunto interrogated, complainant prays that an injunction may issue out of this court, restraining and enjoining the defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, and each of them, individually, and jointly as constituting the Railroad Commission of the State of Kentucky, from continuing said order of June 20, 1906, mailed to and received by complainant's said District Attorney on July 20, 1906, or putting the same into force and effect on July 29, 1906, or at any time thereafter, so far as it relates to the lines of railroads operated by complainant in the State of Kentucky, or either of them; also restraining and enjoining said defendants, and each of them individually, and jointly as constituting said Railroad Commission, to revoke and cancel said order and the schedule
81 of maximum rates prepared thereunder, so far as they relate to complainant's lines of railroad; also restraining and enjoining said defendants, and each of them individually, and jointly as constituting said Railroad Commission, from recommending or causing to be instituted any prosecution by indictment, or otherwise, against complainant, or any of its officers, agents or employés, to recover any fine or penalty imposed by the McChord Act, for or on account of complainant's failure or refusal to put into force or effect on either or any of its lines of railroad in the State of Kentucky, under protest or otherwise, said Commission's order promulgated July 20, 1906, or the rates fixed in the schedule of maximum rates prepared thereunder;

And that, in the meantime, and until a decision can be had upon complainant's motion for the injunction herein prayed for, a restraining order be granted immediately, restraining the acts sought herein to be enjoined, complainant hereby averring that there is danger of irreparable injury from delay, if action should not be taken until said motion for an injunction be heard and determined.

That a writ of injunction be issued, commanding and enjoining the defendants as above prayed for, and, on final hearing, that said injunction as herein prayed for be made perpetual; that said order of June 20, 1906, promulgated July 20, 1906, and the schedule of maximum rates prepared by said Commission thereunder, so far as the same is made applicable to complainant, or either or any of its railroads in Kentucky, be declared null and void by decree of this court; and that a mandatory injunction be issued, commanding the said defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, constituting said Commission, to recall, revoke and abolish said order and schedule of maximum rates, so far as complainant and its railroads in the State of Kentucky are concerned; and
82 that the said McChord Act be declared and adjudged by decree of this court to be in violation of the Constitution of the State of Kentucky, and the Constitution of the United States, and, therefore, invalid, null and void.

And that complainant may have such other and further relief as in equity it may appear to be entitled to.

Table A.

Exhibit No. 1, with Bill of Complaint.

LOCAL FREIGHT TARIFF

BETWEEN ALL STATIONS

EXCEPT BETWEEN STATIONS ON THE

LOUISVILLE, HARROD'S CREEK & WESTPORT RAILROAD (See Table B).
PENSACOLA & ATLANTIC RAILROAD (See Table C).
ST. LOUIS DIVISION AND BRANCHES (See Table D).

TAKING EFFECT JANUARY 1, 1889.

(REVISED TO AUGUST 1, 1903.)

DISTANCES.	Division No.	PER HUNDRED POUNDS.													Per Mile Per 100 lbs.		In Car Loads Per 100 Lbs.		
		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
For 10 miles and less	1	12	10	9	8	7	6	6	6	5	5	6	6	10	6	5	4	3
Over 10 and not over 15	2	15	13	12	11	10	9	9	9	6	6	9	9	12	9	6	5	4
" 15 " " 20	3	20	17	15	13	12	11	11	11	7	7	11	11	14	11	7	6	5
" 20 " " 25	4	23	20	17	15	14	13	13	13	9	8	13	13	18	13	9	7	5
" 25 " " 30	5	26	23	20	17	16	15	15	15	10	8	15	15	20	15	10	7	6
" 30 " " 35	6	29	25	22	19	18	17	17	17	11	9	17	17	22	17	11	8	6
" 35 " " 40	7	32	27	24	21	20	19	19	19	12	9	19	19	24	19	12	8	6
" 40 " " 45	8	35	30	27	23	22	21	21	21	13	10	21	21	26	21	13	8	7
" 45 " " 50	9	37	32	28	25	24	22	22	22	14	10	22	22	28	22	14	9	7
" 50 " " 55	10	39	34	30	26	25	23	23	23	15	11	23	23	30	23	15	10	7
" 55 " " 60	11	41	35	31	28	26	24	24	24	16	11	24	24	32	24	16	12	8
" 60 " " 65	12	43	37	33	30	27	25	25	25	17	12	25	25	34	25	17	12	8
" 65 " " 70	13	45	39	34	31	28	26	26	26	17	12	26	26	34	25	17	13	8
" 70 " " 75	14	47	41	36	32	29	27	27	27	18	13	27	27	36	25	18	13	9
" 75 " " 80	15	49	42	37	33	30	28	28	28	18	14	28	28	36	25	19	14	9
" 80 " " 85	16	51	44	39	34	31	29	29	29	19	15	29	29	38	25	19	14	9
" 85 " " 90	17	53	45	40	35	32	30	30	30	19	15	30	30	38	25	19	15	10
" 90 " " 95	18	54	46	41	36	32	30	30	30	19	15	30	30	38	25	19	15	10
" 95 " " 100	19	55	47	42	37	32	30	30	30	20	15	30	30	40	25	20	15	10
" 100 " " 110	20	56	48	43	38	33	31	31	31	20	15	31	31	40	26	21	16	11
" 110 " " 120	21	58	50	44	39	34	32	32	32	21	16	32	32	42	26	22	16	11
" 120 " " 130	22	60	52	46	41	36	33	33	33	21	16	33	33	42	27	23	17	12
" 130 " " 140	23	62	53	47	42	37	34	34	34	22	17	34	34	44	27	24	17	12
" 140 " " 150	24	64	55	49	44	39	36	36	36	22	17	36	36	44	28	25	18	13
" 150 " " 160	25	66	57	50	45	40	37	37	37	23	18	37	37	46	28	26	18	13
" 160 " " 170	26	68	59	52	47	42	38	38	38	23	18	38	38	46	29	27	19	14
" 170 " " 180	27	70	60	53	48	43	39	39	39	24	19	39	39	48	29	28	20	15
" 180 " " 190	28	72	62	54	49	44	40	40	40	24	19	40	40	48	30	29	20	15
" 190 " " 200	29	74	64	55	50	45	41	41	41	25	20	41	41	50	30	30	21	16
" 200 " " 210	30	76	65	56	51	46	42	42	42	25	20	42	42	50	30	31	21	16
" 210 " " 220	31	78	67	57	52	47	43	43	43	26	20	43	43	52	31	32	22	17
" 220 " " 230	32	80	69	58	53	48	44	44	44	26	20	44	44	52	31	33	22	17
" 230 " " 240	33	82	71	59	54	49	45	45	45	27	21	45	45	54	31	34	23	18
" 240 " " 250	34	84	72	60	55	50	46	46	46	27	21	46	46	54	32	36	23	18
" 250 " " 275	35	87	75	61	56	51	47	47	47	28	22	47	47	56	32	38	24	19
" 275 " " 300	36	90	77	62	57	52	48	48	48	28	22	48	48	56	32	39	25	20
" 300 " " 325	37	93	79	63	58	53	49	49	49	29	23	49	49	58	32	40	26	21
" 325 " " 350	38	96	81	64	59	54	50	50	50	29	23	50	50	58	33	42	27	22
" 350 " " 375	39	99	83	65	60	55	51	51	51	30	24	51	51	60	33	44	28	23
" 375 " " 400	40	102	85	66	61	56	52	52	52	30	24	52	52	60	33	46	29	24
" 400 " " 425	41	104	86	67	62	57	53	53	53	32	25	53	53	64	34	47	30	25
" 425 " " 450	42	106	87	68	63	58	54	54	54	34	25	54	54	68	34	48	30	25

May it please your Honors to grant unto complainant the temporary restraining order aforesaid, the writ of injunction aforesaid, and the writ of subpœna against said defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually, and as constituting the Railroad Commission of the State of Kentucky, commanding said defendants, under a penalty to be therein fixed, to appear in this court on some certain day to be therein named, and to answer the premises and abide by and perform such decree as may be passed herein, but, to relieve complainant of an undue burden of proof, said answer will not be made under oath, as an answer under oath is expressly waived.

This is the first and only application for a restraining order or an injunction in this case.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By THOMAS B. HARRISON, JR.,
District Attorney.

HENRY L. STONE,
General Counsel for Complainant.

83 STATE OF KENTUCKY,
Jefferson County, set:

Personally appeared before me, George E. Zubrod, a notary public, duly commissioned, qualified and acting in and for the county and State aforesaid, M. H. Smith, who, being duly sworn by me, deposes and says:

That he is the President of the Louisville & Nashville Railroad Company, the complainant in the foregoing bill of complaint, and that he has read the foregoing bill and knows the contents thereof; that the facts therein stated as of complainant's own knowledge are true; and the facts therein stated as upon complainant's information and belief he believes to be true.

M. H. SMITH.

Subscribed and sworn to before me this 24th day of July, 1906.

In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My commission expires on the 5th day of February, 1908.

[SEAL.]

GEORGE E. ZUBROD,
Notary Public Jefferson County, Ky.

(Here follows Exhibit No. 1, marked p. 84.)

85 The foregoing exhibit is endorsed in words and figures as follows, viz:
Filed Jul- 25, 1906, W. G. Chapman, Clerk.

Exhibit No. 2, filed with the foregoing Bill of Complaint, is in words and figures as follows, viz:

OPINION AND ORDER

OF THE

RAILROAD COMMISSION

GOVERNING RATES

ON

GENERAL MERCHANDISE ON RAILROADS IN KENTUCKY.

THE COMMONWEALTH OF KENTUCKY, &C., Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

C. C. McChord, Chairman.

McD. Ferguson, Com. First Dist. A. T. Siler, Com. Third Dist.

Louisville:
George G. Fetter Company.
1906.

(Here follow maximum rates, marked pp. 86, 87, 88, 89 and 90.)

MAXIMUM RATES.

KENTUCKY RAILROAD COMMISSION'S STANDARD TARIFF NO. 1.

Applicable to the Louisville & Nashville Railroad Co.

DISTANCES.		IN CENTS PER HUNDRED POUNDS.												Per Ton of 2000 Lbs.	Per 100 Lbs.	Car Loads Per 100 Lbs.		
		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
For 10 miles and less.	A	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
	B	12	10	9	8	7	6	6	6	5	5	6	6	10	6	5	4	3
Over 10 and not over 15	A	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
	B	15	13	12	11	10	9	9	9	6	6	9	9	12	9	6	5	4
" 15 " " 20	A	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
	B	20	17	15	13	12	11	11	11	7	7	11	11	14	11	7	6	5
" 20 " " 25	A	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
	B	23	20	17	15	14	13	13	13	9	8	13	13	18	13	9	7	5
" 25 " " 30	A	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
	B	26	23	20	17	16	15	15	15	10	8	15	15	20	15	10	7	6
" 30 " " 35	A	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
	B	29	25	22	19	18	17	17	17	11	9	17	17	22	17	11	8	6
" 35 " " 40	A	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
	B	32	27	24	21	20	19	19	19	12	9	19	19	24	19	12	8	6
" 40 " " 45	A	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
	B	35	30	27	23	22	21	21	21	13	10	21	21	26	21	13	8	7
" 45 " " 50	A	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
	B	37	32	28	25	24	22	22	22	14	10	22	22	28	22	14	9	7
" 50 " " 55	A	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
	B	39	34	30	26	25	23	23	23	15	11	23	23	30	23	15	10	7
" 55 " " 60	A	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
	B	41	35	31	28	26	24	24	24	16	11	24	24	32	24	16	12	8
" 60 " " 65	A	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
	B	43	37	33	30	27	25	25	25	17	12	25	25	34	25	17	12	8
" 65 " " 70	A	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
	B	45	39	34	31	28	26	26	26	17	12	26	26	34	25	17	13	8
" 70 " " 75	A	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
	B	47	41	36	32	29	27	27	27	18	13	27	27	36	25	18	13	9
" 75 " " 80	A	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
	B	49	42	37	33	30	28	28	28	18	14	28	28	36	25	19	14	9
" 80 " " 85	A	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
	B	51	44	39	34	31	29	29	29	19	15	29	29	38	25	19	14	9
" 85 " " 90	A	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
	B	53	45	40	35	32	30	30	30	19	15	30	30	38	25	19	15	10

A—Figures are the Reduced Rates. B—Figures are the Old Rates

Applicable to the Louisville & Nashville Railroad Co.—Continued.

DISTANCES.		IN CENTS PER HUNDRED POUNDS.												Per Bbl. Per 100 lbs.		Car Loads Per 100 Lbs.		
		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
Over 90 and not over 95	A	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	8
	B	54	46	41	36	32	30	30	30	19	15	30	30	68	25	19	15	10
" 95 " " 100	A	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
	B	55	47	42	37	32	30	30	30	20	15	30	30	40	25	20	15	10
" 100 " " 110	A	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
	B	56	48	43	38	33	31	31	31	20	15	31	31	40	26	21	16	11
" 110 " " 120	A	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8
	B	58	50	44	39	34	32	32	32	21	16	32	32	42	26	22	16	11
" 120 " " 130	A	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
	B	60	52	46	41	36	33	33	33	21	16	33	33	42	27	23	17	12
" 130 " " 140	A	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
	B	62	53	47	42	37	34	34	34	22	17	34	34	44	27	24	17	12
" 140 " " 150	A	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
	B	64	55	49	44	39	36	36	36	22	17	36	36	44	28	25	18	13
" 150 " " 160	A	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
	B	66	57	50	45	40	37	37	37	23	18	37	37	46	28	26	18	13
" 160 " " 170	A	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
	B	68	59	52	47	42	38	38	38	23	18	38	38	46	29	27	19	14
" 170 " " 180	A	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
	B	70	60	53	48	43	39	39	39	24	19	39	39	48	29	28	20	15
" 180 " " 190	A	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
	B	72	62	54	49	44	40	40	40	24	19	40	40	48	30	29	20	15
" 190 " " 200	A	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
	B	74	64	55	50	45	41	41	41	25	20	41	41	50	30	30	21	16
" 200 " " 210	A	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
	B	76	65	56	51	46	42	42	42	25	20	42	42	50	30	31	21	16
" 210 " " 220	A	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
	B	78	67	57	52	47	43	43	43	26	20	43	43	52	31	32	22	17
" 220 " " 230	A	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
	B	80	69	58	53	48	44	44	44	26	20	44	44	52	31	33	22	17
" 230 " " 240	A	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
	B	82	71	59	54	49	45	45	45	27	21	45	45	54	31	34	23	18
" 240 " " 250	A	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
	B	84	72	60	55	50	46	46	46	27	21	46	46	54	32	36	23	18
" 250 " " 275	A	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
	B	87	75	61	56	51	47	47	47	28	22	47	47	56	32	38	24	19

A—Figures are the Reduced Rates. B—Figures are the Old Rates.

Applicable to the Louisville & Nashville Railroad Co.—Continued.

DISTANCES.		IN CENTS PER HUNDRED POUNDS.														Per 100 lbs.	Car Loads Per 100 Lbs.			
		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
Over 275 and not over 300	A	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
	B	90	77	62	57	52	48	48	48	28	22	48	48	56	32	39	25	20
" 300 " " 325	A	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
	B	93	79	63	58	53	49	49	49	29	23	49	49	58	32	40	26	21
" 325 " " 350	A	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
	B	96	81	64	59	54	50	50	50	29	23	50	50	58	33	42	27	22
" 350 " " 375	A	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
	B	99	83	65	60	55	51	51	51	30	24	51	51	60	33	44	28	23
" 375 " " 400	A	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
	B	102	85	66	61	56	52	52	52	30	24	52	52	60	33	46	29	24
" 400 " " 425	A	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
	B	104	86	67	62	57	53	53	53	32	25	53	53	64	34	47	30	25
" 425 " " 450	A	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19
	B	106	87	68	63	58	54	54	54	34	25	54	54	68	34	48	30	25

A—Figures are the Reduced Rates. B—Figures are the Old Rates.

MAXIMUM RATES.

KENTUCKY RAILROAD COMMISSION'S STANDARD TARIFF NO. 2.

Applicable to the Illinois Central Railroad Co.

DISTANCES		IN CENTS PER HUNDRED POUNDS												Cts. Per Bbl	In cents per 100 lbs.				
		1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	P
For 10 miles and less	A	10	8	7	6	6	5	5	5	4	4	5	5	8	4	4	3	2	2
	B	25	21	17	15	13	11	9	11	10	10	14	15	20	11	11	5	4½	4
Over 10 and not over 15	A	12	10	10	9	8	7	7	7	5	5	7	7	10	5	5	4	3	3
	B	31	26	21	19	17	14	12	14	13	12	17	20	26	14	14	5	5	5
" 15 " " 20	A	16	14	12	10	10	9	9	9	6	6	9	9	12	6	6	5	4	4
	B	31	26	21	19	17	14	12	14	13	12	17	20	26	14	14	5	5	5
" 20 " " 25	A	17	15	13	11	11	10	10	10	7	6	10	10	14	7	7	5	4	4
	B	37	31	25	22	19	16	15	16	15	14	19	22	30	16	16	7	6	6
" 25 " " 30	A	20	17	15	13	12	11	11	11	8	6	11	11	16	8	8	5	5	5
	B	37	31	25	22	19	16	15	16	15	14	19	22	30	16	16	7	6	6
" 30 " " 35	A	22	19	17	14	14	13	13	13	8	7	13	13	16	8	8	6	5	5
	B	41	34	28	25	22	19	18	20	17	16	21	25	34	16	16	8	6	6
" 35 " " 40	A	24	20	18	16	15	14	14	14	9	7	14	14	18	9	9	6	5	5
	B	41	34	28	25	22	19	18	20	17	16	21	25	34	16	16	8	6	6
" 40 " " 45	A	26	23	20	17	17	16	16	16	10	8	16	16	20	10	10	6	5	5
	B	45	38	31	28	25	22	24	24	20	18	24	29	40	17	17	9	7	7
" 45 " " 50	A	28	24	21	19	18	17	17	17	11	8	17	17	22	11	11	7	5	5
	B	45	38	31	28	25	22	24	24	20	18	24	29	40	17	17	9	7	7
" 50 " " 55	A	29	26	23	20	19	17	17	17	11	8	17	17	22	11	11	8	5	5
	B	49	41	35	31	27	24	26	26	21	19	25	31	42	18	18	10	8	8
" 55 " " 60	A	31	26	23	21	20	18	18	18	12	8	18	18	24	12	12	9	6	6
	B	49	41	35	31	27	24	26	26	21	19	25	31	42	18	18	10	8	8
" 60 " " 65	A	32	28	25	23	20	19	19	19	13	9	19	19	26	13	13	9	6	6
	B	53	44	36	32	28	26	28	28	22	20	26	32	44	18	18	11	9	9
" 65 " " 70	A	34	29	26	23	21	20	20	20	13	9	20	20	26	13	13	10	6	6
	B	53	44	36	32	28	26	28	28	22	20	26	32	44	18	18	11	9	9
" 70 " " 75	A	35	31	27	24	22	20	20	20	14	10	20	20	28	14	14	10	7	7
	B	55	46	37	33	30	28	28	28	23	21	28	34	46	20	20	12	9	9
" 75 " " 80	A	37	32	28	25	23	21	21	21	14	11	21	21	28	14	14	11	7	7
	B	55	46	37	33	30	28	28	28	23	21	28	34	46	20	20	12	9	9
" 80 " " 85	A	38	33	29	26	23	22	22	22	14	11	22	22	28	14	14	11	7	7
	B	58	48	39	35	32	30	30	30	25	22	28	35	50	20	20	12	9	9
" 85 " " 90	A	40	34	30	26	24	23	23	23	14	11	23	23	28	14	14	11	8	8
	B	58	48	39	35	32	30	30	30	25	22	28	35	50	20	20	12	9	9

A—Figures are the Reduced Rates. B—Figures are the Old Rates.

DISTANCES		IN CENTS PER HUNDRED POUNDS												Cts. Per Bbl.	In cents per 100 lbs.				
		1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
Over 90 and not over 95	A	41	35	31	27	24	23	23	23	14	11	23	23	28	14	14	11	8	8
	B	60	50	41	36	32	30	30	30	26	23	30	36	52	21	21	13	9	9
" 95 " " 100	A	41	35	32	28	24	23	23	23	15	11	23	23	30	15	15	11	8	8
	B	60	50	41	36	32	30	30	30	26	23	30	36	52	21	21	13	9	9
" 100 " " 110	A	42	36	32	29	25	23	23	23	15	11	23	23	30	16	16	12	8	8
	B	61	51	42	37	33	31	31	31	27	24	31	37	54	22	22	14	10	10
" 110 " " 120	A	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8
	B	62	52	42	37	33	32	32	32	27	24	32	37	54	22	22	15	10	10
" 120 " " 130	A	45	39	35	31	27	25	25	25	16	12	25	25	32	17	17	13	9	9
	B	64	53	43	38	34	33	33	33	28	24	33	38	56	23	23	15	10	10
" 130 " " 140	A	47	40	35	32	28	26	26	26	17	13	26	26	34	18	18	13	9	9
	B	65	54	44	39	35	34	34	34	28	24	34	38	56	24	24	15	10	10
" 140 " " 150	A	48	41	37	33	29	27	27	27	17	13	27	27	34	19	19	14	10	10
	B	66	56	45	41	36	35	35	35	30	25	35	38	60	25	25	16	11	11
" 150 " " 160	A	50	43	38	34	30	28	28	28	17	14	28	28	34	20	20	14	10	10
	B	66	57	46	42	37	36	36	36	32	25	36	38	64	26	26	16	11	11
" 160 " " 170	A	51	44	39	35	32	29	29	29	17	14	29	29	34	20	20	14	11	11
	B	68	59	48	44	39	38	38	38	33	25	38	40	66	28	28	17	12	12
" 170 " " 180	A	53	45	40	36	32	29	29	29	18	14	29	29	36	21	21	15	11	11
	B	70	61	50	46	40	39	40	40	34	25	39	41	68	29	29	17	12	12
" 180 " " 190	A	54	47	41	37	33	30	30	30	18	14	30	30	36	22	22	15	11	11
	B	71	62	51	47	41	40	41	41	34	25	40	42	68	30	30	17	12	12
" 190 " " 200	A	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12	12
	B	72	63	52	48	42	40	42	42	34	25	40	42	68	30	30	17	12	12
" 200 " " 210	A	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12	12
	B	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
" 210 " " 220	A	59	50	43	39	35	32	32	32	20	15	32	32	40	24	24	17	13	13
	B	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
" 220 " " 230	A	60	52	44	40	36	33	33	33	20	15	33	33	40	25	25	17	13	13
	B	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
" 230 " " 240	A	62	53	44	41	37	34	34	34	20	16	34	34	40	26	26	17	14	14
	B	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
" 240 " " 250	A	63	54	45	41	38	35	35	35	20	16	35	35	40	27	27	17	14	14
	B	82	72	59	54	48	46	48	48	36	25	46	48	72	36	36	18	13	13
" 250 " " 275	A	65	56	46	42	38	35	35	35	21	17	35	35	42	29	29	18	14	14
	B	85	75	61	56	50	47	49	49	36	25	48	49	72	38	38	18	13	13
" 275 " " 300	A	68	58	47	43	39	36	36	36	21	17	36	36	42	29	29	19	15	15
	B	88	77	63	57	52	48	50	50	36	25	50	50	72	39	39	18	13	13
" 300 " " 325	A	70	59	47	44	40	37	37	37	22	17	37	37	44	30	30	20	16	16
	B	91	79	64	58	53	49	51	51	36	26	51	51	72	41	41	19	14	14

A—Figures are the Reduced Rates. B—Figures are the Old Rates.

91 Before the Railroad Commission.

THE COMMONWEALTH OF KENTUCKY, ETC., Plaintiffs,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

Opinion and Order of the Commission.

The several complaints which, for convenience, have been consolidated and heard together in this investigation, raise for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon all railroads to and from all points within the State. Throughout the entire investigation this Commission has not been unmindful of the very great importance of the issues involved to the shippers and consumers throughout the Commonwealth as well as the railroads. It has been our endeavor to ascertain the truth in order that we might intelligently discharge our duties under the law. And we approach the determination of this exceedingly important case fully impressed with the magnitude of the responsibility thus devolved upon the Commission and the propriety of rendering a decision, which, under a broad view
92 of all the attending circumstances, may be characterized as fair and just.

The annual reports of all the railroads for the fiscal year ended June 30, 1905, show the total mileage in the State to be 3,374, the total gross receipts $34,856,447, total net receipts $9,754,957. The valuation placed by the Railroad Commission upon all the tangible property of these railroads was for the year indicated $61,149,924.

Our investigation of the rate situation shows that all rates charged by the railroads in Trunk Line and Central Freight Association territory, which is that territory north of the Ohio and east of the Mississippi rivers, to and from points on the Ohio river are very much lower than are the rates south of the Ohio river. Through rates are made to the Ohio river, but to points south of the Ohio river the full local rates are added to the through rates. We find that the principal portion of Kentucky is served by the Louisville & Nashville, the Illinois Central, the Southern Railway in Kentucky, the Cincinnati, New Orleans & Texas Pacific and the Chesapeake & Ohio Railway.

As regards the adjustment of rates, we find that the present rates upon all these railroads have been in effect for many years. In fact, very few changes in rates have been made except to occasionally lower or raise some of them, notwithstanding the fact that the volume of business has very greatly increased and the receipts of all the roads have steadily grown and the remarkable improvement in motive power and equipment enables them to handle the traffic with much less labor and cost proportionate to the volume of business done.

The lowest rates charged by any of the defendants are those

charged by the Cincinnati, New Orleans & Texas Pacific Railway Company, and this road has forced the Louisville & Nash-
93 ville Railroad Company on its Kentucky Central Division, embracing 254 miles, and also the Southern Railway in Kentucky, to meet its rates. It is claimed by the defendants that the rates charged by the Cincinnati, New Orleans & Texas Pacific Railway Company are entirely too low, and the fact is cited that some years ago this road was forced into bankruptcy, and that the Kentucky Central Division of the Louisville & Nashville Railroad Company, which was formerly an independent corporation, was likewise forced into bankruptcy, as was also the Louisville Southern Railway, now the Southern Railway in Kentucky. It is earnestly contended that it would not be fair to require the other railroads in the State to reduce their rates to those charged by the Cincinnati, New Orleans & Texas Pacific Railway Company.

It is true these roads were at one time forced into the hands of a receiver, but for years past they have been prosperous and money-makers. In fact, the defendant, the Louisville & Nashville Railroad Company, which is conceded to be a good business institution, purchased the Kentucky Central Railroad, knowing that it would be compelled to charge the low rates forced upon it by the Cincinnati, New Orleans & Texas Pacific Railway Company. Under this adjustment of rates this latter road serves points like the city of Cincinnati and patrons on its line, with but few exceptions, at rates twenty-five per cent. lower than the Louisville & Nashville and Illinois Central serve their patrons out of the city of Louisville and patrons on their lines, except that to points on the Kentucky Central Division of the Louisville & Nashville south of Paris, the Louisville & Nashville Railroad Company serves its patrons out of Louisville at the Cincinnati rate.

It will thus be seen that under the present adjustment of rates one section of the State is served upon better terms than the
94 others. It is argued that the various communities throughout the State and business institutions have been built up and fostered under the present adjustment of these rates, and that any radical departure from this adjustment would be disastrous not only to the shippers but to the communities served by the railroads.

The Commission has endeavored to weigh all the facts and to familiarize itself with the conditions as they actually exist, and we do not believe any such disastrous results will follow the conclusions we have reached in this investigation.

The several complaints herein allege that all the rates upon all the railroads in the Commonwealth of Kentucky are unjust, unreasonable, extortionate and discriminatory. In view of the fact that most of the traffic in Kentucky is carried, and a greater portion of the State is traversed and served by six of the principal railroads, to-wit: The defendants, the Louisville & Nashville, the Illinois Central, the Chesapeake & Ohio, the Louisville, Henderson & St. Louis, the Cincinnati, New Orleans & Texas Pacific and the Southern Railway in Kentucky, this investigation has, so far, been mainly confined to these six roads. Copies of each complaint were furnished to the defendants, all of whom filed answers in which each and all

denied that their rates as a whole or any part thereof are either unjust, unreasonable, extortionate, or discriminatory.

In order to intelligently pass upon these questions and to enable the Commission to have all information possible to be obtained bearing upon the question of rates and the operation of the railroads, a series of questions was propounded to each of the defendants pertaining to their capitalization, construction, operation, value and general conduct of their business as common carriers in relation to traffic wholly within the State. The defendants were re-
95 quested to furnish statements showing the actual amount of freight and passenger traffic in Kentucky, both intrastate and interstate, the receipts, the cost of operation, and all other operating statistics for the year 1905. After these questions were propounded the defendants represented to the Commission that to furnish this information for the entire year would cause a delay of nearly twelve months and involve a vast amount of labor and expenditure of a large sum of money. It was, therefore, agreed that four representative months should be selected, and that the information called for should be estimated for the entire year upon the showing for the months so selected. The defendant, the Louisville & Nashville Railroad, operating the largest mileage in the State, 1,265 miles, supplied the required information in greatest detail, though by no means as full and satisfactory as might have been expected, while the other defendants failed to furnish the information requested in such form and extent as to equal in value that furnished by the Louisville & Nashville. Indeed, in the whole conduct of this case, the burden of justification laid upon all the defendants has been largely borne by the Louisville & Nashville Railroad.

A number of extended hearings have been had, and each defendant has been given the widest latitude and the fullest opportunity to justify the rates in issue, and all have been urged to furnish to the Commission all facts having a tendency to throw light upon the subject and to facilitate bringing out everything pertinent to the inquiry.

The Commission understands that the theory of the defense of each of the defendants, and particularly that of the Louisville & Nashville Railroad, is based upon the plan which seems to have been agreed upon by complainants and the railroads in the case of Smyth *vs.* Ames, wherein the percentage of operating ex-
96 penses to gross receipts in Nebraska was used to measure the cost of doing all the business. The defendants herein have fallen into the same error that was committed in the Nebraska case, as we shall hereinafter endeavor to demonstrate. However, certain general rules or principles are stated by the Supreme Court of the United States in the cases of Smyth *vs.* Ames, 169 U. S. 466, and Minneapolis & St. Louis R. R. Co. *vs.* Minnesota, 183 U. S. 267 and which, taken together, appear to embrace the following propositions:

1. The value of the property used by the carrier in the service must be ascertained, or, at least, justly estimated.

2. While the amount and value of the stock and bonds must be considered, such amount and value are in no way conclusive upon

the question of the actual property value, as the amount and market value of stocks and bonds can only bear upon that question by way of comparison. The actual property value is the cost of reproduction with such deductions therefrom as may be necessary to represent depreciation and thereby indicate the present condition of the property. If the actual property value is independently determined, that value can not be increased or decreased by the amount of securities the company has seen fit to issue.

3. A sufficient return from operation must be allowed to provide for necessary operating expenses and for taxes as a current yearly charge, and the operating expenses include such renewals and repairs as are necessary to keep up the property.

4. While the allowance should be made to pay a proper return upon the ascertained fair valuation of the property used in the service involved, it must always depend upon the circumstances of the road, manner and method of its operation, the character and
97 amount of the traffic involved, and the extent to which the question is affected by the paramount right of the public to enjoy reasonable transportation charges.

These principles are all definitive of the prohibition in the Federal Constitution that no person shall be deprived of his property without due process of law or be denied the equal protection of the laws. While this restriction exists and must not be invaded, the decisions of the court of last resort give finality to the action of the State, acting through its Legislature, or a commission exercising properly delegated powers.

It was apparently contended in the Smyth-Ames case on behalf of those attacking the Nebraska rates fixed by the Legislature, just as it is here, that it cost from 10 to 25 per cent. more to conduct the purely intrastate business than it did to conduct the average of all business within the State, and that this excess cost or per cent. should be added to the proportion of operating expenses to gross receipts for all traffic to indicate the cost to the carrier for the intrastate business. But it does not appear that this contention was seriously disputed or opposed in any such way as to attract the attention of the court. In other words, this theory for ascertaining the cost of doing the State traffic seems to have been conceded by counsel for the State as well as for the railroads in the Nebraska case. The only point of difference regarding this proposition seems to have been that counsel for the State of Nebraska contended that the gross receipts and the operating expenses from all traffic within the State of Nebraska should be considered, whereas the contention of the attorneys for the railroad was that only the purely State
98 traffic should be considered without reference to what the roads earned upon interstate traffic, or what it cost to produce the interstate traffic. It may be true that the rates charged on the purely State business in Nebraska may have been already so low that taken in gross as represented in total earnings from that business and compared with the actual expenses for doing the intrastate business, the percentage of these expenses to these earnings was, in fact, at least 10 per cent. more than the percentage of operating expenses to earnings from all traffic.

However this may be, we are of the opinion that the theory of those acting for the carriers in the Nebraska case, as is the theory advanced by counsel in the case at bar, that the percentage of operating expenses to gross receipts represents cost, was, and is, wholly untenable.

The answers and statements made by the defendants embrace claims of greater cost of operation for the purely State freight traffic ranging from 10 to 25 per cent. above the average cost of doing all the State and interstate business of Kentucky on their respective lines. The defendants have insisted upon a method of stating this increase cost which calls for discussion of this opinion. The Louisville & Nashville, though doing a much larger State freight business than any other carrier in Kentucky; and whose aggregate traffic also greatly exceeds that of any other defendant, asserts that the greater cost of doing the State freight business amounts to 25 per cent., and in stating its claim this company takes the percentage of its total operating expenses to total earnings in Kentucky, State and interstate included, which is reported as 69.16 per cent. and adds 25 per cent. thereto to cover the cost of the State business. This amounts to 94.16 per cent. of the total earnings from intrastate freight in Kentucky. And to this it also adds a proportion of the State taxes amounting to 3.42 per cent., giving a total of 97.58 per cent. of the gross earnings on State freight as its asserted cost of carrying such freight.

99 The fallacy of these claims lies in the fact that 69.16 per cent. does not stand for the total cost at all, nor for any part of the cost. The factor 69.16 simply represents the *relation* between the total cost expressed in dollars and cents and the total receipts expressed in dollars and cents. The cost and the earnings may both be high or both be low, and yet the same relation may exist. The cost of doing a particular part of the whole traffic may be more than the average cost, and yet the per cent. of that cost to high earnings on that particular traffic may be less than the percentage of the whole cost to the gross earnings. The expense, or cost, to the carrier of a given amount of transportation has no necessary connection with the earnings, or profits derived from that transportation. Since the cost, either total or average, is ascertainable solely from its own elements, it can never be expressed by percentage.

Suppose a line of road carried for a given period only three tons of freight and no passengers, its total operating charge being applicable to the earnings of those three tons, and assume the following costs and charges for each ton:

A. One ton, cost.....	70 cents.	Earnings or charge.....	90 cents.
B. One ton, cost.....	60 cents.	Earnings or charge.....	80 cents.
C. One ton, cost.....	20 cents.	Earnings or charge.....	80 cents.
Three tons, cost.....	$1.50.	Total earnings or charges.	$2.50

The percentage of the operating expenses, or total cost, to the total or gross earnings would be ($1.50 divided by $2.50) 60 per cent.

The general or average cost would be ($1.50 divided by 3), 50 cents per ton. Now, suppose it is desired to state by percentage how much more "ton A" cost than the general or average cost of 50
100 cents. Knowing the cost of "ton A" to be 70 cents, and the general cost to be 50 cents, it is readily found that the difference is 40 per cent. It can therefore be claimed, and by correct mathematics demonstrated that "ton A" cost the carrier to transport it, 40 per cent. more than the general average cost.

Now, if it is desired to state by percentage the cost of "ton A" (70 cents) to the earnings or charge for the transportation (90 cents), the percentage is easily found by dividing 70 cents by 90 cents, with a result of 77.77 + per cent., or 17.77 + per cent, in excess of the 60 per cent. relation of total expenses to gross earnings.

In the same way, and by the same rule of computation, "ton C," which cost the carrier only 20 cents to transport and yield an earning charge of 80 cents, shows a percentage of cost to the earning charge of only 25 per cent., or 35 per cent. *less* than the 60 per cent. relation of total expenses to gross earnings.

If, instead of ascertaining the true percentage of cost to the earning charge for "ton A" to be 77.77+ per cent., a claim is set up that "ton A" costs 40 per cent. more than the general or average cost, and should on that account be added to the percentage of total operating expenses to gross earnings (60 per cent.), the addition makes the claimed cost of "ton A" (40 per cent. plus 60 per cent.) 100 per cent. and consequently that "ton A" was carried without any profit whatever.

Carrying the illustration to its logical conclusion, the same computation must be made for "Ton C," which cost 20 cents to transport, and 30 cents *less* than the average or general cost of 50 cents. This difference of 30 cents is 60 per cent. of the general or average cost. If the cost above the general or average cost of "ton A" is to be *added* to the percentage of total operating expenses
101 to gross earnings (60 per cent.), then for "ton C" the cost of its transportation below the general or average cost must be *deducted* from the percentage of total operating expenses to gross earnings (60 per cent.). As the cost of "ton C" is 60 per cent. *less* than the general or average cost, it follows, by this rule, that it costs nothing whatever to transport "ton C," and that the charge received for its earnings was all profit. The foregoing illustration, or example, we think, puts before the mind in the simplest form the wide distinction between actual cost or actual general cost on the one hand, and on the other hand percentage of total cost to total earnings, and shows, *reductio ad absurdum*, the total inadmissibility of the defendants' claim for a minimum cost to it for doing the intra-state Kentucky business represented by adding 25 per cent. to 69.16 per cent. (the percentage of all expenses to all earnings) and making a total of 94.16 per cent., to which it adds taxes, 3.42 per cent. and asserts a total cost for that business of 97.58 per cent. A claim of 28 per cent. additional on this basis, instead of 25 per cent. would have extinguished every vestige of profit and put it in the position of transporting the large intrastate traffic in Kentucky at a

positive loss, thereby adding unjustly to the burden of the interstate business.

The examples above given show that the ratio of operating expenses to earnings is in no sense the statement of the actual cost, and the cost can not, viewed by itself, be expressed by percentage at all. Whatever the facts as to the actual cost may have been in the Nebraska case, it is, we think, quite clear that in this case the cost is one thing and the percentage or ratio of expenses to earnings is an altogether different thing, and that neither can be used to express or indicate the other. It is not too much to say of the Nebraska case that the contentions of the attorneys for
102 the State were directed chiefly to establishing the proposition that the action of the State could not be declared invalid unless the rates fixed should result in a loss from operation of the road in all business, interstate as well as State, and that the assertion of the State's authority played a principal part in their arguments, resulting possibly in failure to analyze the testimony or to supply necessary testimony on behalf of the State.

With all this, however, the Kentucky Commission has nothing to do. Whether the theory of the defense as applied to the facts of the case is correct or incorrect, and what the actual situation is, are the chief matters for determination in respect of cost. That such theory of the defense is altogether inadmissible is plain from the foregoing analysis.

We are of the opinion that the term or factor used by the defendants for the purpose of stating the cost of doing the State freight business and all statements submitted which are based upon the use of that term or factor, can not be accepted.

At the request of the Commission, the defendant, the Louisville & Nashville Railroad, submitted a statement showing in detail its apportionment of operating expenses between passenger and freight business. We have endeavored to make a fair analysis of this statement, in order to arrive at a fair approximation of the cost to that defendant for doing the freight service in Kentucky during the year 1905, upon a ton-mile basis, which is the correct basis, and have endeavored to so apportion this cost as to show the relative cost per ton-mile of intra-state and interstate freight traffic. This analysis shows that there is properly chargeable to such freight traffic the sum of $6,535,753.09, of which there is chargeable to haul-
103 age or transportation proper, $5,014,823.22, and to services other than haulage or transportation $1,520,929.87. The sum total of the items charged against haulage, $5,014,823.22, is fairly apportionable between State freight and interstate freight upon the basis of ton-miles of haul of each, while the sum total of all other items, $1,520,929.87 is fairly apportionable between these two classes of freight upon the basis of tons of each.

The total number of tons of freight carried, both State and interstate, within the State of Kentucky during the year in question is, according to the returns of the defendant, 9,358,270, and the total number of ton-miles of transportation during the same period within the State of Kentucky is 1,291,340,617. The average haul of State freight was 96.97 miles. The average haul of interstate

freight was 148.82 miles. Dividing that portion of the charge, $1,520,929.87, the amount to be apportioned upon the basis of tons, by the total number of tons, 9,358,270, gives an average charge per ton for station, loading and unloading, advertising, damage, and the like, *i. e.*, for all services except haulage, of 16.25 cents. This charge being divided by the average haul of the State traffic (97.96) gives the corresponding charge per ton mile against State traffic on account of all services except haulage, amounting to .1659 cents. Dividing the same average charge per ton by the length of haul upon the interstate traffic, 148.82 miles, gives the average charge for this portion of the interstate service, .1092 cents.

The total charge for haulage, $5,014,823.22, divided by the number of ton-miles of haul, which is 1,291,340,617, gives the haulage charge per ton-mile, .3884 cents. Adding to this for the State traffic .1659 cents, gives the fair estimated cost of all services
104 for State traffic per ton-mile, .5543 cents, while in like manner the fair estimated cost per ton-mile of interstate traffic is .4976 cents (the sum of .3884 cents and .1092 cents), thus showing that the fair estimate of the cost of conducting the State traffic per ton-mile is 11.4 per cent. higher than that of conducting the interstate traffic.

On the other hand, the earnings per ton-mile of State traffic are 1.307 cents, while those per ton mile of interstate freight are only .759 cents, showing that the gross profit per ton-mile of State freight is .753 cents as against .261 cents gross profit per ton-mile on interstate freight; so that at the rates now in force the gross profit per ton-mile on State traffic is nearly three times as great as that on interstate freight.

It will also be observed that where the State traffic costs per ton-mile .5543 cents and brings in earnings of 1.307 cents per ton-mile, the operating ratio on the State traffic is 42.40 per cent., while on the interstate traffic, with a cost per ton-mile of .4976 cents and earnings per ton-mile of .759 cents, the operating ratio is 65.57 per cent.

The estimated valuation submitted by the Louisville & Nashville as showing the actual present value of the property is the only valuation shown, although this evidently contains a number of items open to serious question. This valuation, which applies to all the property in Kentucky and includes equipment as well as the physical property, is estimated at $70,530,727.91. The present supply of capital seeking investment is such that bonds upon railway property like that of the defendant can readily be marketed upon the basis of from 4 to 4½ per cent. annual return. Stock shares upon similar property can be readily marketed upon the basis of not to exceed 4 to 5 per cent. annual return, and an addition on the
105 whole actual capital of about 1 to 1½ per cent. is usually ample allowance for accumulating surplus. The Louisville & Nashville stock now sells currently at from 140 to 150, and is considered upon the market as fairly certain to yield 6 per cent. dividends, making the annual return upon the investment range from 4 2-7 to 4 per cent. That is to say, the investor who buys a share of Louisville & Nashville stock and pays for it $150, does so upon the expectation of deriving from it an annual dividend of $6, which is 4 per cent.,

upon his investment. He thus says that he considers, under all the circumstances, that 4 per cent. per annum is a fair rate of annual return upon the investment and one that he is willing to accept.

The annual addition to surplus in the Louisville & Nashville Railroad Company is somewhat less than the amount paid out in dividends, having been for the year ended June 30, 1905, about nine-tenths, and for prior years still less, and such devotion of income to surplus more than sufficiently insures the payment of dividends. It has, in fact, resulted in the accumulation of a surplus of undivided profits, beginning with *June 30, 1894*, and *ending on June* 30, 1905, which amounts to $14,899,106. This alone is more than sufficient to pay 6 per cent. dividends for four years. To obtain on this basis the average percentage by which to compute the annual allowance for the actual valuation, we take, on account of the funded debt, 2-3 of such capital at 4.25 per cent., which equals 2.83 per cent., on account of stock, 1-3 of such capital at 4.30 per cent. which equals 1.43 per cent.; on account of accumulation and maintenance of surplus, an allowance of 1.30 per cent. is ample. These figures added together give a percentage of 5.56 per cent. and indicate that an allowance of 5.6 per cent. on account of charges upon capital is extremely liberal. This applied to the carrier's estimate of
106 actual valuation of its Kentucky property, gives an annual charge on account of valuation, amounting to 4,450,488.75, including taxes which are stated to be $500,752.75.

To apportion this annual charge on account of valuation, first, as between the State and interstate passenger and freight business, and second, as between the State passenger and freight business, and do so with fair regard to the carrier's interests as well as those of the public, is a task of no little difficulty and one which we are not advised has been attempted heretofore in any similar case in any State, nor have we been assisted in this respect in any degree by the defendant carriers. We have before us simply the total actual valuation of the property in Kentucky as estimated by the carrier's consulting engineer. We have first had to determine the proper annual charge to be allowed for such valuation, and in doing so we have taken into account the market value of the carrier's stock and bonds and the maintenance of its surplus. Now, how shall this Commission, guided by no precedent, apportion this current annual charge of (in round figures) $4,450,500 and arrive at the proper portion of that charge to be laid against the State freight traffic of the defendant in Kentucky. Certainly neither gross earnings nor net earnings can be a satisfactory basis of apportionment of these charges for this purpose, particularly where the purpose of the apportionment is to determine the propriety of the rates from which these gross earnings and net earnings result. In this case the earnings result from the rates in question. This annual charge for valuation is in a sense part of the carrier's cost, and to attempt to justify the apportionment of costs by the earnings resulting from rates, and then to justify the rates by the apportionment of costs based on the earnings resulting from the rates,
107 would clearly be reasoning in a circle. Nor can any suitable basis for apportionment of this annual charge on account of

valuation, be derived from transportation statistics relating to passengers and freight, for the obvious reason that there is no common transportation unit, except the train-mile or car-mile, and the use of the train-mile or car-mile would give no help in apportioning between State freight and interstate freight, because no trains are devoted solely to either class of freight, nor is any considerable number of cars assigned exclusively to either class of freight.

Plainly, then, we have left only the operating expenses as a basis of apportionment. The operating expenses for all traffic in Kentucky are reported to be $10,127,126, the annual charge on account of valuation of $4,450,500 is 43.95 per cent. of the reported total cost of operation. The operating expenses chargeable against State freight, as made up from the figures furnished by the carrier are $1,235,023. Apply this factor of 43.95 per cent. to the estimated cost to the carrier of doing the State business gives $542,744 as the fair total charge to be made against the State traffic on account of actual valuation including taxes. Adding this sum $542,744 to the estimated operating expenses, $1,235,023, amounts to $1,777,767. This sum represents the operating expenses of the carrier on the State traffic in Kentucky in 1905, and a fair return to that carrier upon the use of its property in the conduct of that business for that year. This amount includes not only the fairly apportioned cost of operation and taxes, but also net earnings of 5.6 per cent. on the actual value of the property. It also includes, what have not been heretofore mentioned, a liberal allowance (more than 13 1-3 per cent. of reported operating expenses), out of which to make permanent improvements to the property, and a considerable sum amounting to $259,842.46 wrongfully charged against Kentucky in the statement of salaries paid to general officers and general office clerks. The salaries and wages paid to all general officers and general office clerks whose headquarters are at Louisville, despite the fact that their services are in large part on account of parts of the system outside of Kentucky, were charged by the carrier wholly to Kentucky. We think these salaries and wages should be apportioned upon no higher basis than the average percentage shown for wages paid to other officers and other employés. The actual amount exacted by the Louisville & Nashville Railroad Company for the State freight service over its lines is $2,552,273.62. This exceeded the allowance above made, merely, $1,777,767.79, by $774,506.63.

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The Commission does not of course, undertake to say that the computations, the results of which are hereinbefore set forth, are mathematically accurate, for it is universally conceded that any exact statement of the cost to a carrier for performing its freight service as compared with its passenger service, or for performing a part of the freight service as compared with the remainder, can not be made. The Commission has merely done the best it could with the figures and facts before it, but it has endeavored in all its computations to make the most liberal allowance for actual valuation. Yet, with all this, we have a result showing charges by this carrier for intrastate traffic within the State of Kentucky, which are more than $774,000 in excess of just and reasonable rates.

On account of the failure of the other defendants herein to furnish

the data called for, the Commission has been forced to use that furnished by the Louisville & Nashville Railroad alone in making its analysis, and, aside from the annual reports made by each of the defendants as to their earnings, very little information has been furnished by the other defendants that would be of any assistance to the Commission in making a similar analysis for each of them.

109 The accounts of the railroads in Kentucky are not kept so as to show a separation of their intrastate and interstate earnings and operating expenses, and when called upon by the Commission to give this information they were forced to resort to the original way-bills on file in their main offices and much delay was thereby occasioned. As an illustration of the enormous task which would be required to make a complete showing of all these earnings and operating expenses separately, it may be noted that for the Louisville & Nashville Railroad alone it would necessitate a separation and inspection of more than 250,000 way-bills per month. As stated, the Commission was compelled to accept this data for four representative months, and the railroads were required to employ an extra force of clerks in order to tabulate it, and when the information was furnished it was altogether unsatisfactory to the Commission as well as to the roads themselves. The Commission was very much surprised to see the very meagre showing made by each of the railroads regarding their intrastate traffic. It is not possible in this opinion to take up all these matters in detail. It is interesting, however, to note the several answers made to Question No. 28, "State Freight Earnings per mile of road in Kentucky;"

Louisville, Henderson & St. Louis R. R.	$1,069.81
Illinois Central R. R.	1,435.62
Cincinnati, New Orleans & Texas Pac. R'y.	873.78
Southern Railway in Kentucky	1,728.67
Chesapeake & Ohio Railway	1,837.72
Louisville & Nashville R. R.	2,017.24
Lexington & Eastern Railway	1,837.72
Louisville & Atlantic Railway	1,886.11

When it is recalled that the gross receipts per mile for the year indicated, upon the Louisville & Nashville Railroad for all traffic in the State of Kentucky was $11,567 and that of the Illinois Central Railroad $10,932, the showing made by them as above stated

110 as to their earnings per mile on intrastate freight is, to say the least, somewhat remarkable.

Other answers and statements might be taken up in detail and referred to, but, in view of the conclusions reached by the Commission, it is not deemed necessary to do so. Primarily all local rates are made upon a mileage scale. Each road has its own scale of rates made upon a mileage basis. These rates are departed from where circumstances and conditions in the opinion of the carrier warrant such departure in lowering the rates shown by this scale. An examination of these various mileage scales discloses the fact that different maximum rates have been adopted by the several defendants. We

find that the scale of rates used by the defendant, the Cincinnati, New Orleans & Texas Pacific Railway, are, as a rule, the lowest maximum rates of any of the defendants. It is also found that the Louisville & Nashville Railroad on its Kentucky Central Division has departed from its regular mileage scale and, on account of competition with the Cincinnati, New Orleans & Texas Pacific, the latter company's rates are in effect upon the Kentucky Central Division. We also find that the mileage scale of rates made by the Southern Railway in Kentucky are approximately the same as those upon the Cincinnati, New Orleans & Texas Pacific, while those upon the Illinois Central are much higher than those of either of the aforesaid defendants. Considerable irregularity prevails in some of these scales. We, however, find that the scale of the Louisville & Nashville Railroad as shown in its local freight tariff designated "Table A," is, to say the least, more uniform, but we are of the opinion that the rates therein shown for all distances, under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M and N, to and from all points wholly within the State of Kentucky are extortionate, unjust and unreasonable. It is, therefore, Ordered, That said defendant, the

111 Louisville & Nashville Railroad Company, be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky, rates in excess of the rates shown in the following table for the classes and distances therein stated, to wit:

Distances.	In cents per hundred pounds.												Per bbl.	Per 100 lbs.	Car loads per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
Over 10 and not over 15.....	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
" 15 " " 20.....	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
" 20 " " 25.....	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
" 25 " " 30.....	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
" 30 " " 35.....	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
" 35 " " 40.....	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
" 40 " " 45.....	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
" 45 " " 50.....	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
" 50 " " 55.....	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
" 55 " " 60.....	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
" 60 " " 65.....	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
" 65 " " 70.....	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
" 70 " " 75.....	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
" 75 " " 80.....	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
" 80 " " 85.....	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
" 85 " " 90.....	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
" 90 " " 95.....	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	8
" 95 " " 100.....	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
" 100 " " 110.....	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
" 110 " " 120.....	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8

Distances.	In cents per hundred pounds.												Per bbl.	Per 100 lbs.	Car loads per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
Over 120 and not over 130.....	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
" 130 " " 140.....	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
" 140 " " 150.....	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
" 150 " " 160.....	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
" 160 " " 170.....	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
" 170 " " 180.....	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
" 180 " " 190.....	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
" 190 " " 200.....	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
" 200 " " 210.....	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
" 210 " " 220.....	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
" 220 " " 230.....	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
" 230 " " 240.....	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
" 240 " " 250.....	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
" 250 " " 275.....	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
" 275 " " 300.....	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
" 300 " " 325.....	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
" 325 " " 350.....	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
" 350 " " 375.....	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
" 375 " " 400.....	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
" 400 " " 425.....	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
" 425 " " 450.....	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19

112 Provided, however, That where said defendant, the Louisville & Nashville Railroad Company, has in effect a tariff, or tariffs, of rates, upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated "Maximum Rates, Kentucky Railroad Commissioner's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," said defendant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs.

The Commission is further of the opinion that the Maximum Mileage Scale of Rates published in Nashville, Chattanooga & St. Louis Railway Company's Local Tariff Number 7, effective May 1, 1900, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, L, M and N, are extortionate, unjust and unreasonable in so far as same are in excess of the rates herein fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company." It is, therefore, Ordered, That the said defendant, the Nashville, Chattanooga & St. Louis Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky, rates in excess of the rates shown in said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," and for the classes and distances therein stated.

Provided, however, That where said defendant, the Nashville, Chattanooga & St. Louis Railway Company has in effect a tariff, or tariffs, of rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein desig-
113 nated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The Commission is further of the opinion that the maximum mileage scale of rates published in the Illinois Central Railroad Company's Local Freight Tariff No. A-1045, effective December 2, 1905, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, K, L, M, N, and O, are extortionate, unjust and unreasonable in so far as same are in excess of the rates hereinafter fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company." It is, therefore, Ordered, That said defendant, the Illinois Central Railroad Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky, rates in excess of the rates shown in the following table for the classes and distances therein stated, to wit:

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Distances.	In cents per hundred pounds.												Cts. per bbl.	In cts. per 100 lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	4	4	3	2	2
Over 10 and not over 15...	12	10	10	9	8	7	7	7	5	5	7	7	10	5	5	4	3	3
" 15 " " 20...	16	14	12	10	10	9	9	9	6	6	9	9	12	6	6	5	4	4
" 20 " " 25...	17	15	13	11	11	10	10	10	7	6	10	10	14	7	7	5	4	4
" 25 " " 30...	20	17	15	13	12	11	11	11	8	6	11	11	16	8	8	5	5	5
" 30 " " 35...	22	19	17	14	14	13	13	13	8	7	13	13	16	8	8	6	5	5
" 35 " " 40...	24	20	18	16	15	14	14	14	9	7	14	14	18	9	9	6	5	5
" 40 " " 45...	26	23	20	17	17	16	16	16	10	8	16	16	20	10	10	6	5	5
" 45 " " 50...	28	24	21	19	18	17	17	17	11	8	17	17	22	11	11	7	5	5
" 50 " " 55...	29	26	23	20	19	17	17	17	11	8	17	17	22	11	11	8	5	5
" 55 " " 60...	31	26	23	21	20	18	18	18	12	8	18	18	24	12	12	9	6	6
" 60 " " 65...	32	28	25	23	20	19	19	19	13	9	19	19	26	13	13	9	6	6
" 65 " " 70...	34	29	26	23	21	20	20	20	13	9	20	20	26	13	13	10	6	6
" 70 " " 75...	35	31	27	24	22	20	20	20	14	10	20	20	28	14	14	10	7	7
" 75 " " 80...	37	32	28	25	23	21	21	21	14	11	21	21	28	14	14	11	7	7
" 80 " " 85...	38	33	29	26	23	22	22	22	14	11	22	22	28	14	14	11	7	7
" 85 " " 90...	40	34	30	26	24	23	23	23	14	11	23	23	28	14	14	11	8	8
" 90 " " 95...	41	35	31	27	24	23	23	23	14	11	23	23	28	14	14	11	8	8
" 95 " " 100...	41	35	32	28	24	23	23	23	15	11	23	23	30	15	15	11	8	8
" 100 " " 110...	42	36	32	29	25	23	23	23	15	11	23	23	30	16	16	12	8	8

| | | |

Provided, however, That where said defendant, the Illinois Central Railroad Company has in effect a tariff, or tariffs of rates, upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 2,
115 Applicable to the Illinois Central Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The Commission is further of the opinion that all rates now in effect upon the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway in Kentucky, as shown by their respective tariffs and mileage scale of rates on file in this office, respectively, to-wit: Cincinnati, New Orleans & Texas Pacific Railway Company's Local Mileage Tariff Number 8, effective January 1, 1906, and Southern Railway Company in Kentucky's Local Tariff Number 4, effective February 27, 1905, where the same are in excess of the mileage scale of rates hereinbefore fixed for the defendant, the Louisville & Nashville Railroad Company and herein designated "Maximum Rates Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad Company," are hereby declared to be extortionate, unjust and unreasonable. It is, therefore, Ordered, That said Cincinnati, New Orleans & Texas Pacific Railway Company and said Southern Railway Company in Kentucky be, and they are, hereby forbidden to charge, collect or receive for the transportation of commodities, rates in excess of those herein permitted to be charged by said Louisville & Nashville Railroad Company as shown by said Standard Local Scale of Rates.

Provided, however, That where either of said defendants, the said Cincinnati, New Orleans & Texas Pacific Railway Company or said Southern Railway in Kentucky, now has in effect rates lower than those fixed by said standard scale, said defendants shall not charge, collect or receive rates in excess of said lower rates as now published by said defendants respectively.

In view of the fact that the defendant, the Chesapeake &
116 Ohio Railway Company, uses what is known as the "Official Classification," which is entirely different from the Southern Classification now in use by nearly all of the railroads in the State of Kentucky, and not being able at this time to assimilate said classifications, or to make an accurate comparison thereof, the Commission does not feel warranted at this time in making a mileage scale of rates or a classification for the use of the said Chesapeake & Ohio Railway Company. It is, however, of the opinion, and it is now Ordered, That said Chesapeake & Ohio Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities, rates in excess of those herein permitted to be charged by the defendant, the Louisville & Nashville Railroad Company, as shown by said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad Company." Said Chesapeake & Ohio Railway Company may assimilate its classification with that of the

Comparison of Present "Table A" Rates of L. & N. R. R. Co. with Rates Prescribed in Kentucky Railroad Commission's Order of ~~July~~ June 20, 1906.

A—Present rates.
B—New Rates.
C—Reduction.

DISTANCES.		PER HUNDRED POUNDS.												Per mile.	Per 100 lbs.	In Car Loads Per 100 Lbs.		
		1	2	3	4	5	6	A	B	C	D	'E	H	F	I	L	M	N
For 10 miles and less	A	12	10	9	8	7	6	6	6	5	5	6	6	10	6	5	4	3
	B	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
	C	2	2	2	2	1	1	1	1	1	1	1	1	2	1	1	1	1
Over 10 and not over 15	A	15	13	12	11	10	9	9	9	6	6	9	9	12	9	6	5	4
	B	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
	C	3	3	2	2	2	2	2	2	1	1	2	2	2	2	1	1	1
" 15 " " 20	A	20	17	15	13	12	11	11	11	7	7	11	11	14	11	7	6	5
	B	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
	C	4	3	3	3	2	2	2	2	1	1	2	2	2	2	1	1	1
" 20 " " 25	A	23	20	17	15	14	13	13	13	9	8	13	13	18	13	9	7	5
	B	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
	C	6	5	4	4	3	3	3	3	2	2	3	3	4	3	2	2	1
" 25 " " 30	A	26	23	20	17	16	15	15	15	10	8	15	15	20	15	10	7	6
	B	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
	C	6	6	5	4	4	4	4	4	2	2	4	4	4	4	2	2	1
" 30 " " 35	A	29	25	22	19	18	17	17	17	11	9	17	17	22	17	11	8	6
	B	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
	C	7	6	5	5	4	4	4	4	3	2	4	4	6	4	3	2	1
" 35 " " 40	A	32	27	24	21	20	19	19	19	12	9	19	19	24	19	12	8	6
	B	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
	C	8	7	6	5	5	5	5	5	3	2	5	5	6	5	3	2	1
" 40 " " 45	A	35	30	27	23	22	21	21	21	13	10	21	21	26	21	13	8	7
	B	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
	C	9	7	7	6	5	5	5	5	3	2	5	5	6	5	3	2	2
" 45 " " 50	A	37	32	28	25	24	22	22	22	14	10	22	22	28	22	14	9	7
	B	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
	C	9	8	7	6	6	5	5	5	3	2	5	5	6	5	3	2	2
" 50 " " 55	A	39	34	30	26	25	23	23	23	15	11	23	23	30	23	15	10	7
	B	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
	C	10	8	7	6	6	6	6	6	4	3	6	6	8	6	4	2	2
" 55 " " 60	A	41	35	31	28	26	24	24	24	16	11	24	24	32	24	16	12	8
	B	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
	C	10	9	8	7	6	6	6	6	4	3	6	6	8	6	4	3	2
" 60 " " 65	A	43	37	33	30	27	25	25	25	17	12	25	25	34	25	17	12	8
	B	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
	C	11	9	8	7	7	6	6	6	4	3	6	6	8	6	4	3	2
" 65 " " 70	A	45	39	34	31	28	26	26	26	17	12	26	26	34	25	17	13	8
	B	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
	C	11	10	8	8	7	6	6	6	4	3	6	6	8	6	4	3	2

Comparison of Present "Table A" Rates—Continued.

DISTANCES.		PER HUNDRED POUNDS.												Per Bbl.	Per 100 lbs.	In Car Loads Per 100 Lbs.		
		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
over 70 and not over 75	A	47	41	36	32	29	27	27	27	18	13	27	27	36	25	18	13	9
	B	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
	C	12	10	9	8	7	7	7	7	4	3	7	7	8	6	4	3	2
" 75 " " 80	A	49	42	37	33	30	28	28	28	18	14	28	28	36	25	19	14	9
	B	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
	C	12	10	9	8	7	7	7	7	4	3	7	7	8	6	5	3	2
" 80 " " 85	A	51	44	39	34	31	29	29	29	19	15	29	29	38	25	19	14	9
	B	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
	C	13	11	10	8	8	7	7	7	5	4	7	7	10	6	5	3	2
" 85 " " 90	A	53	45	40	35	32	30	30	30	19	15	30	30	38	25	19	15	10
	B	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
	C	13	11	10	9	8	7	7	7	5	4	7	7	10	6	5	4	2
" 90 " " 95	A	54	46	41	36	32	30	30	30	19	15	30	30	38	25	19	15	10
	B	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	8
	C	13	11	10	9	8	7	7	7	5	4	7	7	10	6	5	4	2
" 95 " " 100	A	55	47	42	37	32	30	30	30	20	15	30	30	40	25	20	15	10
	B	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
	C	14	12	10	9	8	7	7	7	5	4	7	7	10	6	5	4	2
" 100 " " 110	A	56	48	43	38	33	31	31	31	20	15	31	31	40	26	21	16	11
	B	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
	C	14	12	11	9	8	8	8	8	5	4	8	8	10	6	5	4	3
" 110 " " 120	A	58	50	44	39	34	32	32	32	21	16	32	32	42	26	22	16	11
	B	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8
	C	14	12	11	10	8	8	8	8	5	4	8	8	10	6	5	4	3
" 120 " " 130	A	60	52	46	41	36	33	33	33	21	16	33	33	42	27	23	17	12
	B	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
	C	15	13	11	10	9	8	8	8	5	4	8	8	10	7	6	4	3
" 130 " " 140	A	62	53	47	42	37	34	34	34	22	17	34	34	44	27	24	17	12
	B	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
	C	15	13	12	10	9	8	8	8	5	4	8	8	10	7	6	4	3
" 140 " " 150	A	64	55	49	44	39	36	36	36	22	17	36	36	44	28	25	18	13
	B	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
	C	16	14	12	11	10	9	9	9	5	4	9	9	10	7	6	4	3
" 150 " " 160	A	66	57	50	45	40	37	37	37	23	18	37	37	46	28	26	18	13
	B	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
	C	16	14	12	11	10	9	9	9	6	4	9	9	12	7	6	4	3
" 160 " " 170	A	68	59	52	47	42	38	38	38	23	18	38	38	46	29	27	19	14
	B	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
	C	17	15	13	12	10	9	9	9	6	4	9	9	12	7	7	5	3
" 170 " " 180	A	70	60	53	48	43	39	39	39	24	19	39	39	48	29	28	20	15
	B	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
	C	17	15	13	12	11	10	10	10	6	5	10	10	12	7	7	5	4
" 180 " " 190	A	72	62	54	49	44	40	40	40	24	19	40	40	48	30	29	20	15
	B	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
	C	18	15	13	12	11	10	10	10	6	5	10	10	12	7	7	5	4

Comparison of Present "Table A" Rates—Continued.

DISTANCES.		PER HUNDRED POUNDS												Min. Per	Per 100 lbs.	In Car Loads Per 100 Lbs.		
		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
Over 190 and not over 200	A	74	64	55	50	45	41	41	41	25	20	41	41	50	30	30	21	16
	B	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
	C	18	16	14	12	11	10	10	10	6	5	10	10	12	7	7	5	4
" 200 " " 210	A	76	65	56	51	46	42	42	42	25	20	42	42	50	30	31	21	16
	B	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
	C	19	16	14	13	11	10	10	10	6	5	10	10	12	7	8	5	4
" 210 " " 220	A	78	67	57	52	47	43	43	43	26	20	43	43	52	31	32	22	17
	B	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
	C	19	17	14	13	12	11	11	11	6	5	11	11	12	8	8	5	4
" 220 " " 230	A	80	69	58	53	48	44	44	44	26	20	44	44	52	31	33	22	17
	B	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
	C	20	17	14	13	12	11	11	11	6	5	11	11	12	8	8	5	4
" 230 " " 240	A	82	71	59	54	49	45	45	45	27	21	45	45	54	31	34	23	18
	B	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
	C	20	18	15	13	12	11	11	11	7	5	11	11	14	8	8	6	4
" 240 " " 250	A	84	72	60	55	50	46	46	46	27	21	46	46	54	32	36	23	18
	B	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
	C	21	18	15	14	12	11	11	11	7	5	11	11	14	8	9	6	4
" 250 " " 275	A	87	75	61	56	51	47	47	47	28	22	47	47	56	32	38	24	19
	B	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
	C	22	19	15	14	13	12	12	12	7	5	12	12	14	8	9	6	5
" 275 " " 300	A	90	77	62	57	52	48	48	48	28	22	48	48	56	32	39	25	20
	B	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
	C	22	19	15	14	13	12	12	12	7	5	12	12	14	8	10	6	5
" 300 " " 325	A	93	79	63	58	53	49	49	49	29	23	49	49	58	32	40	26	21
	B	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
	C	23	20	16	14	13	12	12	12	7	6	12	12	14	8	10	6	5
" 325 " " 350	A	96	81	64	59	54	50	50	50	29	23	50	50	58	33	42	27	22
	B	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
	C	24	20	16	15	13	12	12	12	7	6	12	12	14	8	10	7	5
" 350 " " 375	A	99	83	65	60	55	51	51	51	30	24	51	51	60	33	44	28	23
	B	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
	C	25	21	16	15	14	13	13	13	7	6	13	13	14	8	11	7	6
" 375 " " 400	A	102	85	66	61	56	52	52	52	30	24	52	52	60	33	46	29	24
	B	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
	C	25	21	16	15	14	13	13	13	7	6	13	13	14	8	11	7	6
" 400 " " 425	A	104	86	67	62	57	53	53	53	32	25	53	53	64	34	47	30	25
	B	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
	C	26	21	17	15	14	13	13	13	8	6	13	13	16	8	12	7	6
" 425 " " 450	A	106	87	68	63	58	54	54	54	34	25	54	54	68	34	48	30	25
	B	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19
	C	26	22	17	16	14	13	13	13	8	6	13	13	16	8	12	7	6

Southern Freight Classification, and exceptions thereto, now in use by said Louisville & Nashville Railroad Company upon the basis heretofore adopted and now in use by said Chesapeake & Ohio Railway Company for such assimilation as shown by its tariffs now on file in this office.

This Commission has not yet adopted a standard classification for any or all of the railroads in the State, and in the absence of such classification, and for the purpose of effectuating this order, it now hereby adopts the Southern Freight Classification now in effect with the current exceptions issued by the various railroads, defendants hereinbefore named, applicable to Kentucky traffic, and the Commission reserves the power to revoke, change or modify this order and to change or modify any or all of said rates, classifications and exceptions thereto, and reserves further the power to make
117 and issue a classification of its own for the use of any or all of said defendants; and it appearing to the Commission from tariffs now on file in this office that many of the commodities assigned to the various classes stated in the Maximum Rates, Kentucky Railroad Commission's Standard Tariffs Numbers 1 and 2, herein adopted, are transported by the respective railroads on commodity rates, or rates less than those fixed by said standard tariffs, it is now Ordered, That said commodity or such other rates as are lower than those fixed by said Railroad Commission's Standard Tariffs Numbers 1 and 2, shall remain in effect AS MAXIMUM RATES until otherwise ordered by this board.

All other questions herein are reserved for future determination, and the Commission will, from time to time, make and issue such orders upon all matters herein as may be deemed just and proper.

It is further Ordered, That each of the defendants be furnished with copies of this opinion and order, and copies of said Maximum Rates, Kentucky Railroad Commission's Standard Tariffs Nos. 1 and 2, attested by the Secretary of the Commission.

June 20, 1906.

C. C. McCHORD, *Chairman;*
A. T. SILER,
McD. FERGUSON,
Commissioners.

A copy.
Attest:
MOSES R. GLENN,
Secretary of the Railroad Commission.

118 The foregoing exhibit is endorsed in words and figures as follows, viz:

L. & N. R. Co. Law Department July 20 1906 Louisville, Ky.

Clerk's Endorsement: Filed Jul- 25, 1906. W. G. Chapman, Clerk.

Exhibit No. 3, filed with the foregoing Bill of Complaint, is in words and figures as follows, viz:

(Here follow "Table A" Rates, marked pp. 119, 120, and 121.)

The foregoing Bill of Complaint, with exhibits attached, is endorsed in words and figures as follows, viz: Filed July 25th, 1906, W. G. Chapman, Clerk.

122 On the same date, to-wit, on the 25th day of July, A. D., 1906, a Subpœna in Chancery was issued on the foregoing Bill of Complaint, which said Subpœna is in words and figures as follows, viz:

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

The President of the United States of America, to the Marshal of the Eastern Kentucky District, Greeting:

You are hereby commanded to summon Charles C. McChord, Adam T. Siler, and McDougal Ferguson, constituting the Railroad Commission of the State of Kentucky, to appear before our Circuit Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Frankfort, on the first Monday in September next, to answer a bill in equity, exhibited against them in our said Court, by The Louisville & Nashville Railroad Company and this they shall in nowise omit, under the penalty of four hundred dollars: and have you then — there this writ.

In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America, hath caused the seal of our said Circuit Court to be hereunto affixed, at the Clerk's Office of said Court in Frankfort, this 25th day of July, A. D., 1906, and in the 131st year of our Independence.

Attest:

[SEAL.] WALTER G. CHAPMAN, *Clerk.*

123 *Memorandum.*

The said defendants are required to enter their appearance in the Clerk's Office of said Court, on or before the first Monday in September, 1906; otherwise the said Bill may be taken *pro confesso.*

WALTER G. CHAPMAN, *Clerk.*

The Marshal's Return on the foregoing Subpœna in Chancery is as follows, viz:

Received this Subpœna in Chancery at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to each of the within named defendants at the following times and places, viz.: to McDougal Ferguson, on July 26th, 1906, at Frankfort, Ky.; to Adam T. Siler, on July 27th, 1906, at Williamsburg, Ky.; to Charles C. McChord, on August 17th, 1906, at Frankfort, Ky.

Witness my hand this the 17th day of August, 1906.

S. G. SHARP,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

Clerk's endorsement: Returned & filed Aug. 22, 1906. W. G. Chapman, Clerk.

On a day following, to-wit, on the 25th day of July, A. D., 1906, a restraining order was made and entered in said cause, which said restraining order is in words and figures as follows, viz:

124 Circuit Court of the United States, Eastern District of Kentucky, at Frankfort.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, ADAM T. SILER and MCDOUGAL FERGUSON, Individually, and as Constituting the Railroad Commission of the State of Kentucky, Defendants.

The Complainant moved the Court to grant to it a preliminary writ of injunction in accordance with the prayer of the bill of complaint, and said motion is now fixed for hearing on the 24th day of September, 1906, at 11 o'clock, A. M., in the court room in the City of Frankfort, Kentucky; and it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing of said application for the writ of injunction, unless the said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted, and that the said Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force and effect their order of June 20, 1906, promulgated July 19 or July 20, 1906, reducing the railroad rates of the complainant on intrastate freight between points within the State of Kentucky, or putting into force and effect the sched-
125 ule of maximum rates prepared or promulgated thereunder so far as such rates relate to the railroad of the complainant; and also are restrained and enjoined, individually, and jointly as constituting said Railroad Commission, from recommending or causing to be instituted any prosecution by indictment, or other legal proceeding, against the complainant or any of its officers, agents or employés, to recover any fine or penalty imposed by Section 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever, for or on account of complainant's failure or refusal to put into force and effect the Railroad Commission's order aforesaid or the rates fixed in the schedule of maximum rates prepared thereunder, until the hearing upon the said application for writ of injunction and the further order of the court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of said motion if they so desire.

126 Certified copy of said Restraining Order having been placed in the hands of the United States Marshal for the Eastern District of Kentucky for service, the same was returned and filed in

the Clerk's Office on August 22nd, 1906, with said Marshal's return thereon, as follows, viz:

Received this Restraining Order at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to the within named McDougal Ferguson, at Frankfort, Ky., on July 26th, 1906, and further by delivering a true copy thereof to the within named Adam T. Siler, at Williamsburg, Ky., on July 27th, 1906. Charles C. McChord not found within my District.

Witness my hand this the 27th day of July, 1906.

S. G. SHARP,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

Certified copy of said Restraining Order having been placed in the hands of the United States Marshal for the Western District of Kentucky for service, the same was returned and filed in the Clerk's Office on July 28th, 1906, with said Marshal's return thereon, as follows, viz:

Received this writ at Louisville, Ky., July 26th, 1906, and executed same by delivering a true copy thereof to Charles C. McChord at 8 o'clock P. M., July 26th, 1906, in Louisville, Ky.

G. W. LONG,
U. S. Marshal for the Western District of Ky.

127 On a day following, to-wit, on the 3rd day of September, A. D., 1906, an order was made and entered in said cause at Rules, which said order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. Co.
vs.
CHARLES C. McCHORD ET AL.

Now come Charles C. McChord, Adam T. Siler and McDougal Ferguson, defendants herein, by their attorney, Bennett H. Young, and enter their appearance in the above styled cause.

On a day following, to-wit, on the 24th day of September, A. D. 1906, an order was made and entered in said cause, which order is in words and figures as follows, viz:

No. 542.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
CHARLES C. McCHORD ET AL.

This cause came on to be heard on the motion for an injunction *pendente lite* and it is ordered that the restraining order hereinbefore entered be continued as an interlocutory injunction until the final hearing of the cause or until the further order of the court herein, the defendants not objecting to this order on condition that

complainant shall stipulate, and said complainant does now so stipulate as follows:

(1) All way-bills made out by it on and after October 1, 1906, on Kentucky intra-state shipments shall show on their face the date, point of origin, point of destination, consignor and con-
128 signee, the character of articles consigned for shipment, weight, rate, freight and total charges.

(2) Such way-bills shall be preserved until the final determination of the cause.

(3) There shall be given to each shipper where he prepays the freight, or to the consignee where he pays the freight, a bill of lading, receipt or expense bill showing the date, point of origin, destination, name of consignor and consignee, character of freight shipped, weight thereof, rate of freight and total amount of freight charges.

(4) The Complainant shall keep all Kentucky intra-state way-bills separate from interstate way-bills and on file in its general offices so separated, to the end that from such way-bills, bills of lading, receipts or expense bills it may be hereafter determined, if such should become necessary or expedient, what amount, if any, was charged to each shipper in excess of a lawful rate. This order, however, is not to prejudice the complainant's right to contest as a matter of law the claim of shippers to recover of it any such excess. And time is given to defendants until November Rules to plead, answer or demur.

This order is entered by consent of parties hereto, John W. Ray, Esq., an attorney of the bar appeared on behalf of the Attorney General of the State and announced that the Attorney General did not consent thereto. The court then announced that it would hear him in regard thereto, but he, not desiring to be heard, the order was entered subject to right of Attorney General at any time to move to set it aside on due notice to parties hereto.

129 On a day following, to-wit, on the 5th day of November, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co.
vs.
CHAS. C. McCHORD ET AL.

This day came the defendants, by their solicitors of record, and filed their answer to the bill of complaint herein.

The Answer of the defendants, Charles C. McCord, McDougal Ferguson and Adam T. Siler, to the Bill of Complaint, referred to in the foregoing order, is in words and figures as follows, viz:

130 Circuit Court of the United States for the Eastern Judicial District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, ADAM T. SILER, and MCDOUGAL FERGUSON, Individually, and as Constituting the Railroad Commission of the State of Kentucky, Defendants.

Answer.

To the Honorable Judges of the Circuit Court of the United States for the Eastern Judicial District of Kentucky:

The defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually, and as constituting the Railroad Commission of the State of Kentucky, respectively, now and at all times hereafter, saving to themselves all, and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the fallacious arguments, the many errors, uncertainties and imperfections in complainant's bill of complaint contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, jointly and severally answering, say:

131 I.

Defendants admit that complainant, the Louisville & Nashville Railroad Company, was originally incorporated and organized under an Act of the General Assembly of the Commonwealth of Kentucky, and that thereafter various amendments to said charter were granted by said General Assembly. As to the character of said amendments and the full extent of the powers thereby conferred, these defendants nor either of them, have not knowledge or information sufficient to enable them to form a belief, except as hereinafter set out, but, for greater certainty, defendants crave leave to refer to the said charter and amendments thereto when produced. Defendants deny that by said charter or any amendment thereto, approved January 17, 1856, or at any other time, complainant was authorized to purchase and hold any railroad constructed by any other company. Defendants admit that complainant owns, controls, or operates the lines and number of miles of railroad set forth in paragraph I of its said bill of complaint. Defendants admit that complainant carries, and has for many years carried large traffic over its lines located in Kentucky, both freight and passenger, and both intrastate and interstate, but they deny that about seventy per cent. of such traffic transported over complainant's line in Kentucky in the fiscal year ended June 30, 1905, in prior years, or since, was strictly, or at all, interstate traffic, or that the rates upon such traffic have a direct or vital connection with the rates on interstate traffic, or a far-reaching effect or influence, or any effect or influence upon commerce between the several States.

132 II.

Defendants deny that there is or ever was a valid or other contract which still subsists, or ever subsisted, between the Commonwealth of Kentucky and complainant, whereby complainant was or is authorized to charge or collect on the railroad owned or leased or operated by it within said Commonwealth of Kentucky, rates for the transportation of freight and passengers not exceeding the following rates, or any other rates, to-wit:

For every one hundred pounds transported over twenty miles and under 50 miles, three and one-half (3½) mills for each mile; for all other transportation of freight and property, not exceeding four (4) mills for each mile per hundred pounds; for transporting single packages any distance weighing not less than one hundred pounds, twenty-five (25) cents; for transporting live stock, poultry, furniture, feathers, wool, rags, and other like light bulky articles, weighing not more than sixty-five (65) pounds to the cubic foot, not exceeding fifteen (15) per cent. above the rates allowed to be charged for heavy merchandise, or that gold, silver, bullion, money of all kinds, and mails, are excepted from the rates established in its said charter, or that complainant's board of directors is thereby authorized to contract especially therefor. They deny that for the transportation of passengers complainant is authorized to charge not exceeding four (4) cents per mile for each passenger with his baggage, weighing not more than forty (40) pounds.

Defendants deny that said maximum rates, which complainant is authorized to charge and collect, are set out, in part, in Sec-
133 tion eighteen (18) of its original charter, approved March 5, 1850, and defendants deny that in so far as they are not set out in that section, complainant is authorized by that section to charge or collect the same maximum rates as were, at the date of the passage and approval of its said original charter, authorized to be charged or collected by or on the railroad from Lexington to Frankfort, Kentucky, which maximum rates were, on March 5, 1850, as set out in Section twenty (20) of the Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to incorporate the Lexington & Frankfort Railroad Company," approved February 28, 1848, or any other Act, and defendants deny that said maximum rates so provided for in Section twenty (20) of said last mentioned act were in full force and effect, charged or collected upon said railroa from Lexington to Frankfort, on March 5, 1850, or at any other time.

Defendants deny that under complainant's said charter, or the amendments thereto, complainant's said railroads in the State of Kentucky, or any of them, were constructed or acquired by it upon the faith of said contract; they deny that under the provisions of complainant's said charter or any amendments thereto complainant is or was authorized to charge or collect said maximum rates, or any of them, and deny that said provisions of said charter or its amendments have never been repealed by any act of the General Assembly of the Commonwealth of Kentucky, and deny that the same are still in full force or effect.

Defendants deny that complainant has never charged or collected

on any of the railroads it owned or operated for the transportation of property or persons in the Kentucky any rate or rates in ex-
134 cess of the maximum rates prescribed or authorized by its said charter and amendments thereto as aforesaid.

Defendants further say that Sections 190, 195 and 196 of the Constitution of the State of Kentucky, adopted September 28, 1891, provide as follows:

"190. No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution.

"195. The Commonwealth, in the exercise of the right of eminent domain, shall have and retain the same powers to take the property and franchises of incorporated companies for public use which it has and retains to take the property of individuals, and the exercise of police powers of this Commonwealth shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals.

"196. Transportation of freight and passengers by railroad, steamboat or other common carrier shall be so regulated, by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

And that Section 570 of Chapter 32 of Kentucky Statutes provides as follows:

"570. No law shall be passed for the benefit of, or in the interest of any corporation heretofore created or organized by or under
135 the laws of this State or any other State; nor shall any corporation avail itself of the provisions of this Chapter, unless such corporation shall have previously, by a resolution adopted by its board of directors and filed in the office of the Secretary of State, accepted the provisions of the Constitution of this State; and such resolution or a certified copy thereof, shall be evidence for and against such corporation."

Defendants further say that complainant desiring to avail itself of the rights and privileges accorded common carriers by the Constitution and statutory laws of the Commonwealth of Kentucky, did, in pursuance of a resolution adopted by its board of directors, and which it filed in the office of the Secretary of State of the Commonwealth of Kentucky on the 14th day of July, 1902, accept the provisions of said Constitution and of said laws. Said acceptance and said resolutions so filed are in words and figures as follows, to-wit:

"At a regular meeting of the Board of Directors of the Louisville & Nashville Railroad Company, duly held pursuant to due notice and adjournment, at the office of the Company in the City of New York, on Friday, the 11th day of July, 1902, a quorum being present, the following resolutions were duly adopted by the affirmative vote of every Director present:

"*Resolved*, That the Louisville & Nashville Railroad Company hereby accepts the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891.

"*Resolved*, That the Louisville & Nashville Railroad Com-
136 pany hereby accepts the provisions of Chapter 32 of the Kentucky Statutes, being the Act adopted April 5, 1893, with the amendments thereto.

"*Resolved*, That a copy of these resolutions be attested under the seal of the corporation by the Chairman of the Board and by the Assistant Secretary, and that the same be filed in the office of the Secretary of State of Kentucky.

"A true copy from the minutes.

"AUGUST BELMONT, *Chairman*.

"Attest: C. W. MORRISS,
"Assistant Secretary."

By said act upon the part of complainant's board of directors, and the filing of same, together with said acceptance, in the office of the Secretary of State, complainant thereby abandoned and relinquished all rights and privileges contained in the said charter and amendments thereto, if any it had, in conflict with the provisions of the Constitution of the Commonwealth of Kentucky and of the laws enacted by the General Assembly of said Commonwealth under said Constitution, and since said acceptance complainant has repeatedly availed itself of the provisions of said Constitution and laws and is and was when said Commission's order was made, subject to and governed by and under the control of the present Constitution of the State of Kentucky, and under the laws enacted thereunder, and all the statutes governing and controlling the operation and conduct of railroads in the State of Kentucky.

III.

Defendants admit that the provisions of Section 209 of the Constitution of the Commonwealth of Kentucky are correctly
137 quoted in Paragraph III of complainant's bill of complaint, but deny that on or prior to September 28, 1891, the Railroad Commission had not been empowered by any then existing constitutional or statutory provision to regulate or to fix the rate, toll or compensation which a railroad company, or corporation, might charge, collect or receive for the service of transporting freight or passengers over its line or lines of railroad in that State; and defendants deny that there never was any attempt made by the General Assembly of the Commonwealth of Kentucky afterward to confer such power upon said Commission until March 10, 1900.

Defendants admit that complainant has correctly set forth the provisions of the Act of March 10, 1900, referred to in said bill of complaint, save and except that in the second line of the title thereof attempted to be quoted, before the word "operating" in said second line of said quotation, and after the word "owning" in the first line thereof, the word "and" is used, whereas the word "or" should have been used, for the reason that in the enrolled bill said word "or" is used instead of said word "and" in said title. Defendants say that the correct title of said bill as enrolled in the office of the Secretary of State of Kentucky is in words and figures as follows:

"An Act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents and employés from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provis-
138 ions of this act and penalties for the violation of its provisions."

Defendants deny that by the said Act the said General Assembly, without lawful power so to do, or otherwise, undertook to authorize said Commission, when complaint shall be made or when it receives information or has reason to believe that any railroad company or corporation is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in the State of Kentucky, to perform judicial functions, that is to say, to hear and determine the matter as speedily as possible, having first given ten days' notice to the company or corporation complained of, by letter mailed to an officer or employee of said company or corporation, stating the time and place of the hearing, also the nature of the complaint or matter to be investigated. Defendants deny that said General Assembly, by the Act aforesaid, without lawful power so to do, or otherwise, attempted to confer the judicial power upon said Commission to hear such statements, arguments or evidence offered by the parties as the said Commission may deem relevant. Defendants deny that should said Commission determine in the exercise of the powers of a court sought to be thus granted to it, that the company or corporation is or has been guilty of extortion, that the said General Assembly, without lawful power so to do, undertook to grant or delegate to said Commission legislative power or to impose on it the duty to make and fix, without further notice or investigation, a just and reasonable rate, toll or compensation which such railroad company or corporation may charge, collect or receive for like services thereafter rendered. Defendants
139 admit that according to the provisions of said Act the rate, toll or compensation fixed by it shall be entered and be an order on the record book of said Commission's office and be in full force and effect at the expiration of ten days after said Commission shall have mailed a copy of the order fixing the same to an officer, agent or employee of the company or corporation affected thereby. Defendants deny that said Act further provides that such order of said Commission may at any time, without further notice, evidence, or investigation, be revoked or modified by an order of said Commission likewise entered of record.

IV.

Defendants say that they have not knowledge or information sufficient to enable them to form a belief as to whether Section 819 of the Kentucky Statutes set forth in Paragraph IV of the bill of complaint herein, is in substance the same as Section 4 of the Act of the General Assembly of the State of Kentucky, approved April 6, 1882, entitled,

"An Act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a board of Railroad Commissioners and define its powers and duties,"

set forth in the General Statutes of Kentucky, edition of 1888, page 1023, but for greater certainty defendants crave leave to refer to said Act and said General Statutes when produced. Defendants
140 admit that said Act of March 10, 1900, does not appear to have been intended to change the settled legislative policy that indictments for such offences should be found on the recommendation of the Railroad Commission; in fact, in the case of McChord and others, defendants herein, versus Louisville & Nashville Railroad Company and others, 183 U. S., p. 483, wherein a construction of said Act was sought by complainant, it was expressly held by the Supreme Court of the United States as follows:

"It is insisted that according to the terms of the act the order of the commission fixing the rate, toll, or compensation which the railroad companies may charge is self-executing, and that no duty to enforce it is imposed on the commission; that the companies are shut up by the act to the final determination of the commission that they have charged more than a just and reasonable rate; and that on the trial of indictments for failure to observe the rates made by the commission the courts can not entertain any inquiry as to the reasonableness of the rates so fixed, because such inquiry is unwarranted by the statute, and because such an investigation would be illusory and worthless; and that, even if the question of constitutionality could be raised in defense, yet that if such order be permitted to be entered of record and notified as provided, the companies, if they do not comply, will be at once exposed to innumerable prosecutions, and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute is upheld.

"However this may be, we think it is not to be doubted that
141 these bills can not be maintained if it appear that the commission is charged with the duty of enforcing the orders it may enter fixing rates. The objection that before this is done the commission is required to exercise judicial functions in determining that the companies have charged or received more than a just and reasonable rate goes to the validity of the act. The fixing of rates is essentially legislative in its character, and the general rule is that legislative action can not be interfered with by injunction. * * *

"Section 816 reads thus: 'If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track or upon any track it has control of or the right to use in this State, it shall be guilty of extortion.' * * *

"The mischief to be cured in respect of extortion, as defined by Section 816, was the want of certainty, and the remedy provided was the fixing of the rates by the railroad commission.

"In so providing, the act, while repeating many of the provisions

of Section 819, did, indeed, omit reference to an action by way of information and to liability in damages, and it also omitted the provision that indictments should be made only on the recommendation or request of the railroad commission; but it does not therefore follow that it was the legislative intention, without any expression thereof, in terms, to repeal so important a provision.

"Was the provision repealed by necessary implication? 'We say by necessary implication, for it is not sufficient to establish
142 that subsequent laws cover some or even all of the cases provided for by it (the prior law); for they may be merely affirmative, or cumulative, or auxiliary.' Story, J., Wood *v.* United States, 16 Pet. 362, 10 L. Ed. 995.

"Repeals by implication are not favored, and are only allowed to the extent that repugnancy exists, and, in order to give an act not clearly intended as a substitute for an earlier one the effect of repealing it, the implication of the intention to do so must necessarily flow from the language used, bearing in mind the necessity and occasion of the law. And where it is plain that the new law is in aid of the purposes of the old law, the latter will not be held to be abrogated except so far as there is palpable inconsistency.

"We do not think that it was intended to repeal the provision of Section 819 requiring indictments to be found only on the recommendation or request of the commission, and still less that it was intended to circumscribe in this particular the general duty of the commission to see that the laws relating to railroads should be faithfully executed.

"Dealing as we are with the statutes of Kentucky, we are gratified to find these views confirmed by the Court of Appeals of that Commonwealth, in Illinois C. R. Co. *v.* Com., decided October 25, 1901, its opinion having been furnished us at the close of the argument, and since reported in 23 Ky. L. Rep. 1159, 64 S. W. 975."

And the same court in the case of Louisville & Nashville Railroad Co. *v.* Kentucky, 183 U. S. p. 496, also held:

"It was, however, held by this court that it was not the in-
143 tention or effect of the act of March 10, 1900, to repeal those provisions of Section 819, requiring indictment to be found only on the recommendation of the commission, nor to circumscribe, in this particular, the general duty of the commission to see that the law relating to railroads should be faithfully executed. This view of the meaning and effect of the legislation was that taken by the Court of Appeals of Kentucky in the case of Illinois C. R. Co. *v.* Com., decided while the appeals from the decrees of the Circuit Court of the United States were pending in this court * * *

"As we understand the condition of the statutes of Kentucky, there was at the time when this case was tried in the Circuit Court of Marion County, and when the Court of Appeals disposed of it, no power in the Railroad Commission to fix or establish rates or tolls which the railroad companies were bound to accept. Such power, however, was given to the Commission by the act of March 10, 1900; and it was to restrain the Railroad Commission from taking action under that act that bills in equity were filed by the Louisville &

Nashville Railroad Company and other railroad companies in the Circuit Court of the United States."

V.

Defendants say they admit the provisions of Sections 27, 28, 109, and 135 of the Constitution of Kentucky are substantially as quoted in Paragraph V of said bill of complaint, but, for greater certainty, they crave leave to refer to each and all of said sections when produced. Defendants admit that said Railroad Commission is
144 not a court established by said Constitution or otherwise, nor is it vested with any judicial powers, but defendants deny that said Commission is not vested with any legislative powers or functions concerning rates or otherwise; they deny that said General Assembly is not authorized by said Constitution to legislate upon, regulate or fix such rates for the transportation of freight or passengers; they deny that said General Assembly is not authorized to grant or delegate legislative powers to said Commission to regulate or fix railroad rates for the transportation of freight or passengers within the State of Kentucky; defendants deny that said General Assembly, in violation of any provision of the Constitution of Kentucky by said act of March 10, 1900, or otherwise, attempted to grant or delegate to or combine in said Railroad Commission all three of the fundamental powers of said State government or of a government republican in form, or otherwise, viz: those which are legislative; those which are executive; and those which are judicial; they deny that said Commission is an anomalous or unconstitutional body which, with respect to any or all proceedings or investigations before it concerning the rates charged, collected or received by railroad carriers of intrastate freight and passengers, occupies the attitude of complainant, judge, legislator, and prosecutor; defendants deny that said Commission may be complainant, or may act as the complainant's attorney, and deny that said Commission, as judge, may try all preliminary questions and pass on the guilt or innocence of the carrier accused of extortion; defendants admit that in the exercise of the legislative powers which have been conferred upon it, it may make and fix just and reasonable rates for like services
145 thereafter rendered by the carrier when it shall be ascertained that said carrier is charging, collecting or receiving extortionate, unjust, or unreasonable rates; defendants admit that said Commission may recommend indictments to the grand juries of the Commonwealth in proper jurisdictions against the carrier for charging, collecting or receiving rates in excess of those fixed by said Commission, but defendants deny that said Commission may recover in behalf of the State from the carrier thus indicted the penalties imposed by said act for such excessive charges.

Defendants deny that the said act denies or refuses railroad carriers the right of appeal to or review by the courts or tribunals possessing judicial powers from orders made by the Railroad Commission adjudging railroad companies guilty of extortion or of charging unjust, unreasonable or extortionate rates of toll, or fixing the compensation which said railroad companies may charge, collect or receive for services to be thereafter rendered.

Defendants deny that the said Act does not allow or does attempt to prevent a judicial investigation or review of the question of the reasonableness of the existing rate, toll or compensation being charged, collected or received by railroad carriers or of the accusation of extortion. Defendants deny that an order made by the Railroad Commission adjudging that an existing rate of any railroad company operating a line of road in the State of Kentucky for the transportation of intrastate freight or passengers can not be reviewed by the proper judicial tribunal, or that the Act was intended to prevent such an investigation, or that it intended to prevent such investigation by an indictment or other criminal proceeding instituted against it for a violation of the Act, or the orders made pur-
146 suant thereto. Defendants deny that the Act prevents the carrier, its officers, agents or employés indicted for the alleged offense of extortion from making or establishing a defense that the existing rate charged, collected or received is just, reasonable, or that the rate made and fixed by the Commission is not just and reasonable. Defendants deny that such an issue could not be tried by a jury or court of criminal jurisdiction. Defendants deny that the Act is rendered invalid because a jury or a court in one case might find the railroad company, its officers, or employés guilty, while a court or jury in another case, on substantially the same facts, might find them not guilty.

The defendants again deny that the order of the Commission was intended by said Act or is so conclusive as to what is a just and reasonable rate, toll or compensation for the services of the carrier as to prevent a judicial investigation as to whether it is just, reasonable or extortionate, or confiscatory in character. Defendants deny that because the Act imposes fines and penalties for the violation of the order of the Commission, that thereby the Act is rendered invalid.

VI.

The defendants deny that the said Act is unconstitutional, void, or violative of the Constitution of the State of Kentucky, or that it constitutes an abandonment by the said State of a republican form, or other form, of government in so far as it undertakes to vest powers in a Railroad Commission, or that the powers invested in the Railroad Commission for fixing rates of toll to be charged by railroad carriers is of a judicial character, or that the Act intended
147 that the order of the Commission in fixing rates is of a judicial character. Defendants deny that the Act is violative of either the letter or spirit of Section 4, Article 4, of the Constitution of the United States, or that it is void. Defendants deny that the said Act deprives the carrier, the complainant, or any of the interested carriers, of their right to a judicial investigation by due process of law under the form or with the machinery provided for the judicial investigation of the matter in controversy, or that it substitutes for such an investigation, as an absolute finality, or other finality, the action of the Railroad Commission.

Following the oft-repeated averment of the bill, the defendants deny that the Act does or attempts to confer judicial powers upon

the Railroad Commission. Defendants deny that the Act attempts to confer powers of an arbitrary nature over the property of railroad carriers or the use thereof, or that the enforcement thereof operates to deprive such carriers of their property without due process of law, or denies to such carriers the equal protection of the law, or that the Act is unconstitutional or void, or that it is violative of Section 1, Article 14, of the amendments to the Constitution of the United States, or of any other section or article thereof. Defendants deny that the said Act has not been construed in any case by the Court of Appeals of Kentucky, or that it has not been upheld as valid or constitutional by any court of competent jurisdiction, either State or Federal.

VII.

Defendants deny that the General Assembly of the State of Kentucky attempted, by denouncing penalties and fines for violation of said Act or the orders of the Railroad Commission, to prevent
148 any judicial inquiry as to the validity of the said Act or such proceedings as might be taken thereunder by the Railroad Commission. Defendants deny that by reason of said Act the railroad carriers are constrained or do submit to an unjust unreasonably low rate made and fixed by said Commission for services in transporting intrastate freight or passengers rather than to take the chances of fines and penalties imposed for refusal or failure to comply with said Commission's order fixing rates. Defendants deny that by reason of said Act railroad carriers are deprived by the State of Kentucky, through the operation of said Act, or otherwise, of the equal protection of the laws, or that said Act is in violation of Section 1, Article 14, of the amendments to the Constitution of the United States. They deny that the penalties denounced by the said Act are excessive, or that they are excessive within the meaning or intent or in violation of Section 17 of the State Constitution of Kentucky, or of Article 8 of the amendments to the Constitution of the United States.

VIII.

Defendants in answer to Paragraph VIII state that the eighth paragraph, like many other paragraphs, of the bill of complaint is more in the nature of an argument than a statement of facts necessary to constitute a cause of action, and is based upon the untenable assumption that the Railroad Commission by said Act is given judicial powers and that its orders are intended to be final and not subject to review by the courts. The defendants out of abundance of caution deny that the State of Kentucky by said Act singles out common carriers by railroad and denies them the equal protection
149 of the laws granted by said State to all other common carriers, or deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates when the same are called in question or charged to be extortionate, or that the statute substitutes for a judicial determination the arbitrary determination of said Railroad Commission, or that the railroad carriers are not afforded a judicial hearing; and defendants deny that the rail-

road common carriers are denied the right of judicial determination of the question as to whether their rates are reasonable or just any more than such rights are denied to other common carriers in the State; in fact, neither class of common carriers is denied a judicial determination of the questions. The defendants deny that railroad carriers by the provisions of said Act have had taken out of their hands the right to fix rates and the same vested in the Railroad Commission, whose finding is final and conclusive, not subject to judicial investigation.

Defendants again deny the repeated statements in the bill of complaint that *in prosecutions for the violation of the Act or the order* made by the Commission that the railroad carriers are deprived of the right to interpose the defense that the rates existing before the action of the Commission were reasonable and just, not extortionate or discriminatory. They deny that the railroad carriers are deprived of their property without due process of law, or denied the equal protection of the laws, or that the Act is in violation of Section 1, Article 14, of the amendments to the Constitution of the United States.

The defendants aver that the General Assembly by its Act in question did not intend, nor does it have the effect of discrim-
150 inating against common carriers in the State. The State has the right to classify or to regulate the business of its common carriers and provide the necessary tribunals for their proper regulation, and these tribunals can be vested with authority to regulate the conduct of the business of any or all of said common carriers and fix and determine proper rates of toll which they shall charge for the transportation of freight or passengers.

IX.

Defendants deny that said Act relates to and affects all freight and passenger rates charged, collected or received by railroad carriers in the State of Kentucky, or is not restricted to rates actually charged, collected or received within said State for the transportation of traffic having its origin and destination in said State, or by its terms and provisions said Act is an express and direct or other interference with or regulation of interstate commerce, or in conflict with Subsection 3, Section 8, of Article 1, of the Constitution of the United States, which vests in the Congress of the United States the exclusive power to regulate commerce among the several States, which power the Congress has exercised by "An Act to regulate Commerce," approved February 4, 1887, and the amendments thereto, and defendants deny that said Act is therefore, or for any other reason, either unconstitutional or void. Defendants deny that said Act or any part thereof undertakes to regulate, or that the same relates to or affects interstate commerce.

X.

Defendants admit that one J. Ed. Guenther, of Owensboro, Kentucky, addressed various communications to the chairman of said Commission wherein the said Guenther made complaints
151 against the complainant herein and various other railroad companies, but they deny that the complainant herein has

fully stated the nature of said complaint. Defendants say that other citizens of the State of Kentucky also filed with said Commission complaints against complainant and said other railroad companies, all of which complaints were consolidated and heard together, and which complaints, together with the intervening petition or complaint upon the part of the Commonwealth of Kentucky, copies of which are herewith filed as part hereof marked "Exhibit A." Defendants deny that complainant has fully stated the various steps taken by said Commission in the investigation of said complaints. Defendants deny that during the hearing of said Guenther's complaint complainant's local rates out of Owensboro to Henderson Division stations were put back to practically where they were before they were increased on account of the alleged operation of the long and short haul provision of the present Constitution of the State of Kentucky, which became effective September 28, 1891; they deny that some changes were made in local rates to stations reached via Green River, which more nearly placed Owensboro on an equality with Evansville as to these stations. Defendants admit that on or about August 16, 1905, said Commission announced its conclusions as to interstate rates complained of by said Guenther, and ordered that a petition in accordance with the provisions of Section 826 of the Kentucky Statutes be filed before the Interstate Commerce Commission, which petition was accordingly filed and a copy of which is hereto attached as part hereof marked "Exhibit B."

Defendants deny that there was no legal authority for the
152 employment by the Governor of the Commonwealth of Kentucky of attorneys to represent the Commonwealth before the said Commission. Defendants deny that said intervening petition thus filed by said attorneys and thereafter prosecuted in the name of the Commonwealth of Kentucky was without authority of law; they deny that complainant has fully set forth the allegations of the petition so filed by said attorneys for the Commonwealth, and a copy of said petition is herewith filed as part hereof marked "Exhibit C." Defendants deny that prior to the filing of said intervening petition for the Commonwealth of Kentucky the said Guenther on October 3, 1905, or at any other time, asked said Commission to be allowed to dismiss his complaint and amended complaint, stating that he did not desire to and would not prosecute said proceeding any further against the carriers made defendants thereto, or that said Commission refused to let him do so, or that said Guenther thereafter took no further steps in the prosecution of said proceedings. Defendants admit that during the progress of the investigation of said complaints before said Commission, said J. Ed. Guenther did file a written statement requesting that his said complaint be dismissed, but defendants are advised and now aver that said Guenther was induced by complainant to make said request in consideration of complainant's promise and agreement to make certain reductions in rates to and from Owensboro, Kentucky, with which agreement complainant failed to comply. Defendants admit that said Act expressly provides that when complaint shall be made to said Commission accusing any railroad company or corporation of charging, collecting or receiving any

extortionate freight or passenger rates, said Commission shall give the company or corporation complained of not less than ten
153 days' notice by letter mailed to an officer, agent or employé thereof, stating the time and place of the hearing of same, also the nature of the complaint or matter to be investigated; defendants deny that this provision of the Statute was not complied with, and they deny that the complainant was not notified of the nature of the complaint or that the particular rate or rates complained of were not specified. Defendants deny that in no one of the complaints or amended complaints in said proceeding before said Commission was there any specific or definite statement as to what rate, or what points, or on what line of road, or on what class of freight, or what commodity was complained of or intended to be attacked as extortionate, except in the complaint of said lumber companies.

Defendants deny that the demurrers and motions set out in Paragraph X of complainant's bill of complaint were either arbitrarily overruled, ignored, or disregarded by the defendants, or that like demurrers or notices made at the same time by other carriers made defendants to said proceeding were so overruled, ignored or disregarded.

Defendants admit that the complaint of said lumber companies was by agreement of all parties first taken up and decided; they deny that complainant has stated in full the order entered by said Commission in determining said lumber complaint. A copy of said order and opinion is herewith filed as part hereof marked "Exhibit D."

Defendants deny that in none of the complaints or amended complaints in the proceedings before said Commission was there any specific or definite statement as to what rate, or between what points, or on what line of road, or on what class of freight, or what
154 commodity was complained of, or intended to be attacked as extortionate, except in the complaint of said lumber companies. Defendants say all of said rates on all of said roads were attacked as extortionate, unjust and unreasonable. Defendants admit that complainant filed various demurrers and motions seeking to avoid the investigation of said complaints by said Commission, all of which, together with the arguments of counsel for all parties interested, were fully heard and considered, and in the exercise of its powers said Commission did overrule said demurrers and motions and proceeded to the investigation of said complaints after complainant had filed its answer therein. Defendants say it is true that counsel for complainant addressed a communication to the chairman of said Commission dated December 6, 1905, in which various objections were made to the opinion and order made by said Commission in the adjustment of rates upon logs, lumber, and cross-ties, that said letter was carefully read and filed in the office of the Commission and is still of record there, but as to what bearing said communication can have upon the issues involved in this proceeding defendants have not knowledge or information sufficient to enable them to form a belief.

XI.

Defendants deny that said Commission without authority of law assumed that there was involved in said proceeding the question of the reasonableness of all rates for the transportation of all classes of intrastate freight and commodities upon all railroads to and from all points within the State of Kentucky. They deny that said Commission further assumed without authority of law that it had
155 jurisdiction to hear and finally determine the same. Defendants aver that they did have jurisdiction of each and all of said complaints and to hear and determine the same as was done by them. Defendants admit that in the progress of the investigation of said complaints said Commission called for certain information and sought to have complainant make answers to various questions propounded to it covering the operations and business of complainant for the fiscal year ended June 30, 1905, and its financial condition as of that date. As to the number of extra employés and accountants required to furnish such information, or the expense entailed in furnishing same, defendants have no knowledge or information sufficient to enable them to form a belief. Defendants deny that the answers made by complainant to such questions and the information furnished by it to said Commission was as fully, accurately, or as much in detail as it was possible for complainant to furnish. Defendants deny that the witnesses introduced by complainant in connection with the information called for and the answers to the questions propounded by said Commission fully or at all established the reasonableness of complainant's existing rates on all or any of its lines, branches, or divisions in the State of Kentucky. Defendants deny that neither the Commission nor the complainants before said Commission introduced any evidence, or evidence that was competent, showing or tending to show that complainant's said existing rates were unjust, unreasonable, or extortionate. Defendants admit that said Commission prepared, or caused to be prepared, a "Table of Comparative Rates on Local Mileage Scale Basis," wherein the
156 rates and earnings upon certain railroads in Kentucky were compared, as well as with the mileage scale of rates upon railroads in other States upon like classifications, also the gross and net earnings upon the various railroads, including that of complainant, and said Commission did make divers and sundry other comparisons of rates, earnings, and classifications of various railroads, including different rates charged by complainant in Kentucky upon its different lines for similar services and distances and among which were the tables set out in Paragraph XI of complainant's bill of complaint, the contents of which defendants do not now undertake to state but for greater certainty they crave leave to refer to the said tables when produced.

Defendants deny that the various tables of comparison between the rates, earnings and classifications upon railroads in Kentucky and elsewhere constituted substantially all the evidence, legal or otherwise, offered or introduced by said Commission or the complainants in said proceedings. They deny that such evidence was obtained second-hand, or as hearsay, or that the same did not show the

rates actually charged either in Kentucky or in either of the States mentioned in complainant's bill of complaint. Defendants deny that no evidence was introduced to prove the existence of similarity of conditions and circumstances between the railroad rates and classifications so compared. Defendants deny that complainant proved without contradiction, or otherwise, that the cost of construction, maintenance and operation of complainant's lines of railroad in Kentucky was materially or substantially greater than the cost of construction, maintenance and operation of railroads in other States. They deny that such proof showed that complainant was justified in charging materially or substantially, or any, higher rates on the class of freight carried the same distance in Kentucky than
157 in either of the States referred to. They deny that to fix and enforce the same rates on railroads in Kentucky as would be just and reasonable in other States would result in great injustice, or any injustice, to complainant. Defendants deny that said tables or any of them were worthless as evidence in said investigation. They deny that said tables were made the basis and ground for the reduction of complainant's rates on certain classes of intrastate freight. Defendants deny that there was no evidence introduced in said investigation or considered by said Commission showing or tending to show that complainant's rates on any class of freight or any commodity on any of its lines of railroad in Kentucky were in and of themselves unjust, unreasonable or extortionate.

XII.

Defendants deny that they, on June 20, 1906, or at any other time, delivered a written opinion and order whereby they determined without authority of law that complainant's rates as shown in the complainant's local freight tariff designated "Table A" for all distances under Classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M, and N, to and from all points wholly within the State of Kentucky, are extortionate, unjust and unreasonable. Defendants deny that they acted in said matter without authority of law. Defendants deny that by said opinion and order of July 20, 1906, they, without authority of law, ordered that complainant be forbidden to charge, collect or receive for the transportation of commodities to and from all points wholly within the State of Kentucky rates in excess of the rates shown in a table prepared by defendants and made a
158 part of their order, for the classes and distances therein stated. They deny that their said order and opinion was without authority of law in that, or in any other respect, wherein it was ordered that where complainant has in effect a tariff or tariffs of rates upon commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Commission's Maximum Table of Rates designated "Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad Co." complainant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs. Defendants aver that under the circumstances it was entirely proper for the Commission to order the commodity, or such other rates as were lower than those fixed by said Railroad Commission's Standard

Tariff No. 1, to remain in effect as maximum rates until otherwise ordered by the Commission; that complainant had established and maintained these rates as just and reasonable and that they were no more than just and reasonable under the circumstances. In addition to its own judgment upon this proposition the Commission was and is fortified by the complainant's judgment evidenced by the fact that complainant made and fixed said rates as just and reasonable; that complainant has not increased these commodity or lower rates or attempted to do so, nor has it made any application to the Commission to have the order changed with reference thereto. Defendants deny that said commodity or other rates, or any of them, are lower than similar rates in force upon other roads, competitors of complainant in business. Defendants deny that that portion of their said order as undertakes to prohibit complainant from increasing the existing commodity rates or in tariffs other than its "Table A
159 Local Freight Tariff" from what they are to said Commission's Maximum Rates on the classes to which such commodities belong is either null or void. Defendants deny that Exhibit No. 3, filed with the bill of complaint, contains a true comparison of complainant's Table A rates with the rates in Kentucky Railroad Commission's order of July 20, 1906, showing for all distances (a) complainant's present rates, (b) the new rates prescribed by said Commission, and (c) the reduction should the order of said Commission become effective. Defendants aver that complainant's said Table A tariff of rates does not show all rates actually charged by complainant and, while it is true that defendants' order was intended to be a reduction of 20 per cent. of the rates shown by complainant's Table A Local Freight Tariff between all stations for distances of 20 miles or less, and of 25 per cent. of the rates shown on that tariff between all stations for distances over 20 miles, yet inasmuch as said Table A tariff does not show all the rates in effect upon complainant's line to and from all points in Kentucky, said reduction of 20 and 25 per cent. was not, in fact, a reduction to that extent of all of complainant's rates actually in effect.

Defendants deny that on the face of the results of operations for the fiscal year ended June 30, 1905, the annual reduction in complainant's rates on intrastate freight in Kentucky would be at least $150,673.74 if defendants' said order is enforced.

XIII AND XIV.

Defendants deny that for complainant to have furnished the information referred to in Paragraph XIII would have caused a delay of nearly twelve months. It is true complainant furnished
160 said Commission what purported to be a statement of complainant's earnings for four months and defendants did consider said statement upon the hearing of the complaint, but said statement and the matters which said Commission considered in the investigation of said complaints have nothing whatever to do with the issues involved in this case. As to whether the figures, calculations and results shown in Paragraphs XIII and XIV of complainant's bill of complaint are in fact correct, defendants have no knowledge or information sufficient to enable them to form a belief. De-

fendants deny that said statement showed the result of operating complainant's lines of railroad in Kentucky for the fiscal year ended June 30, 1905, on their intrastate or interstate business or traffic; and deny that the items or figures set forth in Paragraphs XIII and XIV of the bill of complaint show any such facts, values or results; and deny that the evidence in said investigation showed any such results as therein set forth. Defendants say the calculations, values, figures, and so-called results set forth in said Paragraphs XIII and XIV of the bill of complaint as are other calculations and figures, arguments, data, and briefs submitted by complainant and the original complainants and their attorneys to said Commission in said investigation, are interesting; but defendants say, as to whether, in fact, they were so submitted to said Commission in said investigation is immaterial and irrelevant and can have no bearing upon the issues involved in this action.

XV.

Defendants deny that complainant's net earnings on intrastate traffic in Kentucky are ascertained by deducting from the gross earnings from such traffic only the average percentage which
161 the operating expenses (69.16 per cent. plus 3.42 per cent., or 72.58 per cent.) are of the entire gross earnings from all traffic in that State.

Defendants deny that the percentage of complainant's operating expenses for local or intrastate business in Kentucky is or would exceed the percentage of operating expenses on all business by at least 25 per cent., or any per cent. They deny that the fact of this, or any, extra cost of local or intrastate business was established by the evidence introduced in the proceeding before said Commission. They deny that there was no testimony to the contrary or tending to prove the incorrectness of said estimate in the proceedings before said Commission. They say that neither the evidence adduced nor proceedings before said Commission in said investigation are or can be questioned or made an issue in this case.

Defendants deny that for every $1.00 earned by complainant on intrastate traffic in Kentucky for the fiscal year ended June 30, 1905, it cost complainant at least ninety-seven and fifty-eight hundredths (97.58) cents; they deny that complainant's net earnings during said time were only two and forty-two hundredths (2.42) cents; and they deny that complainant's net earnings on such traffic in that State were not more on the dollar in prior years, and deny that said earnings have not been more since that time.

Defendants deny that on account of the extra hazards of the railroad business, or on any other account, complainant is entitled to net earnings or an income as great or greater than six (6) per cent.; they deny that complainant is entitled to at least eight (8) per cent. per annum. They deny that said per cent. would not be more than a just and reasonable return on the fair value of complainant's investment for railroad purposes in Kentucky de-
162 voted to, used, or employed for the transportation of intrastate traffic. They deny that such valuation was fair; they deny that the value ascertained by either of the methods stated in

Paragraph XIV of the bill of complaint, complainant did not, for the fiscal year ended June 30, 1905, for any prior fiscal year, or for the last fiscal year, under its existing rates, receive, after deducting operating expenses and taxes, a fair, just and reasonable annual return or income, or as much as six (6) per cent. per annum; they deny that complainant received much less than eight (8) per cent. per annum; they deny that complainant was entitled to receive any such return. They deny that notwithstanding the facts stated in the bill of complaint said Commission reduced complainant's rates on intrastate freight traffic to the extent of at least $150,673.74 per annum. They deny that said rates were reduced to said extent; they deny that said Commission erroneously held that four (4) per cent. per annum was and is a fair and just return on the value of complainant's railroad properties devoted to intrastate traffic in Kentucky; they deny that on that ground or other unwarranted assumptions said commission promulgated its order reducing complainant's rates as aforesaid.

XVI.

Defendants deny that the entire reasoning or any reasoning of said Commission with respect to the plan adopted in the case of Smyth *v.* Ames, 169 U. S. 466, known as the Nebraska case, is or was fallacious. Defendants say they have no knowledge or information sufficient to enable them to form a belief as to whether any such emergency as set forth in Paragraph XVI of complain-
163 ant's bill of complaint demanded the adoption of some plan similar to that used in the Nebraska case or as to whether the theory of said plan as set forth in said paragraph is or was the true theory or plan adopted in said case. For greater certainty defendants crave leave to refer to the court's opinion in said case when produced.

Defendants deny that each railroad in Kentucky in making answer to the questions propounded by said Commission divided its revenue into two elements, to-wit: the intrastate and the interstate business; they deny that some or any of the railroads were unable to divide from their books and accounts the total expense for carrying on their Kentucky business, both intrastate and interstate.

The defendants further answering Paragraph XVI of the bill of complaint, admit that the figures used by complainant in this paragraph of its bill of complaint in so far as they are taken from the opinion and order of the Commission, a copy of which is appended to the bill of complaint as Exhibit 2 and made a part thereof, are correct; but for greater certainty defendants crave leave to refer to said exhibit. As to the remainder of said paragraph, each and every conclusion or theory asserted and contended for by complainant in said paragraph of the bill of complaint is averred by the defendants to be incapable of just application, without foundation in rightful practices or accepted mathematical formulæ, and altogether untrue and unsound.

Defendants, further answering, aver that the percentage of 69.16 used by complainant in said paragraph of its bill of complaint does not and can not stand as representing the operating cost to com-

plainant for *each* or *every* 100 cents of revenue, since that
164 necessarily implies that the cost to complainant for operation is exactly the same for each and every kind of service it performs, which is not true, and especially so in this case, as said Commission's order does not affect or reduce all of complainant's intrastate rates or any of its interstate rates. Defendants say that 69.16 per cent. is merely the ratio reported by complainant as showing the relation of its alleged *total* cost of operation to its alleged *total* earnings from operation, and such per cent. does not and can not signify anything more. The actual cost of operation to complainant must of necessity be expressed only in dollars and cents. It cannot be expressed by percentage, since percentage can only imply a relation. When complainant alleges that its intrastate traffic in Kentucky is conducted by it at an expense 25 per cent. greater than its general cost of doing all business, it cannot, without violating all correct and well known rules of mathematics, contend that such assumed 25 per cent. alleged greater cost justifies the claim that 25 per cent. must be added to its reported percentage of operating expenses to total earnings, and thus make its earnings on that traffic. This claim totally disregards the actual earnings on the intrastate traffic, which are very much higher per ton per mile than the earnings on interstate traffic, and the plain fact that with higher earnings or revenue upon one kind of freight the cost of operation as to such freight may be higher than upon other freight, and yet the percentage of the cost of operation to earnings on that particular freight may be the same or it may be much less than the percentage of cost to earnings on the other freight.

Defendants say it is with some hesitancy that they approach complainant's animal exhibition paraded as the result, as it
165 were, of said Commission's addition of 40% to 60%. However, in view of complainant's well known ability to so manipulate figures as to produce results hitherto unknown, defendants, through abundance of caution, say they have no knowledge or information sufficient to enable them to form a belief that in adding 40% to the 60%, said Commission has really, as it were, or otherwise, added two cows and three horses, or any other cows or horses, and obtained a result of five sheep, or any other sheep. As to this proposition, defendants respectfully demand the strictest proof.

Defendants do not, however, admit, but expressly deny, that intrastate freight as conducted by complainant costs the complainant more to transport than its expense per ton per mile for interstate freight, or than its average cost for moving all freight. It is true that complainant in the investigation before the Railroad Commission assumed and contended that its cost per ton of transporting intrastate freight greatly exceeded its cost per ton of moving interstate freight, and its cost per ton of moving all freight; but in no instance did it present any evidence other than the opinions of its own officers, and the only direct evidence as to the cost to complainant of moving interstate and other freight adduced before the said Commission was that which was obtained from data submitted to said Commission during the progress of the investigation. Defendants deny that there is no fallacy in the calculations, theories, figures or arguments

set forth in said Paragraph XVI: they deny that it costs complainant ninety-five cents to earn one hundred cents on intrastate business, or sixty cents to earn one hundred cents on interstate business.

166 XVII.

Defendants, answering Paragraph XVII of the petition, admit that the Railroad Commission did use for the purposes of the case before it, substantially the estimated valuation placed upon the complainant's Kentucky property by its own officers, that is to say, the said Commission used the valuation to the extent and as stated in the opinion and order of said Commission, a copy of which is appended to the bill of complaint as Exhibit 2, and made a part thereof. Defendants also admit that in so far as the figures used by complainant in said Paragraph XVII of the bill of complaint are taken from the opinion and order of the Commission, such figures are correctly stated, but for greater certainty defendants crave leave to refer to said exhibit so filed as the best evidence of what said opinion and order actually states. Except as herein specifically admitted, each and every allegation and statement set forth by complainant in said Paragraph XVII of the bill of complaint is expressly denied; and each and every conclusion or theory asserted and contended for by complainant in said paragraph is averred by defendants to be incapable of just application, without foundation in rightful practices or accepted mathematical formulæ, and altogether untrue and unsound.

Defendants, further answering, aver that with the information furnished, the Railroad Commission did not and could not rightfully attempt to apportion the valuation of complainant's Kentucky property, a part to intrastate and a part to interstate traffic, because the said property of complainant operated in the public service for railroad transportation, must be used and is, in fact, used by
167 complainant indiscriminately for both intrastate and interstate traffic, and the one kind of traffic necessarily adds to the profitable conduct to the other; but what the said Commission did do was to undertake, according to its best judgment, based upon facts demonstrated by complainant's own accounts and capitalization, to apportion as between the different great classes of traffic conducted by complainant, the apparently fair return upon such total valuation. In no other way can the actual value of railroad property used for transportation purposes be applied upon State and interstate freight, or, when necessary, upon State and interstate passenger transportation. Such apportionment of the fair return upon the estimated value of complainant's property, while, indeed, an approximation, is averred, nevertheless, to have been adopted with a view to the most just and liberal allowances in favor of complainant. The averments contained in this answer as applying to Paragraph XVI of the bill of complaint in relation to complainant's claim of greater operating cost of the intrastate traffic are hereby reaffirmed and made part of the answer to the same thing restated in said Paragraph XVII of complainant's said bill of complaint.

Defendants deny that to apportion the value of complainant's property in Kentucky according to the gross earnings in that State

from each kind of traffic is or would have been the fairest or most correct method of apportionment. Defendants deny that they, without either reason or precedent, adopted any erroneous or inequitable plan to make up what it conceived to be a fair annual allowance to complainant upon the valuation of its railroad properties or capital in Kentucky. Defendants deny that they either arbitrarily, or without reason, made any deductions from the figures furnished
168 them by complainant's Assistant Comptroller or any one else. Defendants deny that they reduced the amount of complainant's legitimate operating expenses or taxes chargeable to freight traffic by any erroneous sum or that they improperly divided any sum between expenses for haulage services and expenses other than for haulage. Defendants deny that they assume or assumed erroneously or arbitrarily that the alleged expenses for services other than haulage can be arrived at on a ton basis. They deny that in arriving at its conclusions said Commission made use of any erroneous figures. Defendants deny that in assuming that the expenses for haulage can be properly divided on a ton mile basis and that the expenses for services other than haulage can be properly divided on a ton basis said Commission acted either arbitrarily or that it assumed anything that is or was unfounded or wide of the truth. Defendants deny that it is reasonably, or otherwise, correct to say that wholesale methods can be employed in handling interstate business, while retail methods must be employed in handling intrastate business. They deny that on an average, or otherwise, it will cost three times as much per mile to carry a ton of intrastate freight as it will to carry a ton of interstate freight. They deny that through trains are principally devoted to the carriage of interstate freight or that there will be on an average two or three times as many paying tons of freight in such trains as there are in local trains. They deny that local trains are usually, or otherwise, employed in handling the short-haul intrastate traffic. They deny that there is any difference between the density of tonnage in the transportation of either intrastate or interstate freight upon complainant's lines in Kentucky. Defendants deny that any of its assumptions are or were manifestly or otherwise incorrect.

169 XVIII.

The defendants, answering Paragraph XVIII of the bill of complaint, admit that the figures used by complainant in this paragraph of its bill of complaint, in so far as they are taken from the opinion and order of the Commission, a copy of which is appended to the bill of complaint as Exhibit 2 and made a part thereof, are correct; but as to the remainder of said paragraph, each and every allegation and statement therein set forth, is denied, and each and every conclusion or theory asserted and contended for by complainant in said paragraph of the bill of complaint is averred by defendants to be incapable of just application, without foundation in rightful practices or accepted mathematical formulæ, and altogether untrue and unsound.

Defendants deny that said Commission pursued any unique or fallacious plan for ascertaining the value of complainant's investment

in Kentucky on which it is entitled to receive a fair and just return from intrastate freight. They deny that said Commission erroneously or without reason deducted any sum or amount from the sum or amount reported by complainant as the cost of operating its road. They deny that said Commission arrived at any conclusion that was either fallacious or a perversion of the facts. Defendants say that, while in other paragraphs of complainant's bill of complaint complainant has severely criticised said Commission on account of its making comparisons of rates, classifications and the operation generally of the different railroads in Kentucky and in some of the other States, they observe that in Paragraph XVIII com-
170 plainant does not hesitate to make comparisons of its own railroad and the operation thereof with the railroads of other States throughout the United States when it suits its own convenience or serves its purposes so to do, and, in this connection defendants are forcibly reminded of the axiom that it is a poor rule which will not work both ways.

XIX.

The defendants, answering Paragraph XIX of the bill of complaint, admit that the figures used by complainant in this paragraph of its bill of complaint, in so far as they are taken from the opinion and order of the Commission, a copy of which is appended to the bill of complaint as Exhibit 2 and made a part thereof, are correct; but as to the remainder of said paragraph, each and every allegation and statement therein set forth, is denied, and each and every conclusion or theory asserted and contended for by complainant in said paragraph of the bill of complaint is averred by defendants to be incapable of just application, without foundation in rightful practices or accepted mathematical formulæ, and altogether untrue and unsound.

Defendants deny that said Commission in arriving at its conclusions wrongfully excluded from complainant's freight operating expenses $923,101.52 or any other sum. Defendants deny that said Commission asserts anything in its opinion without foundation in fact.

XX.

Defendants deny that in the order promulgated by said Commission on July 20, 1906, or at any time, said Commission assumed any power which it did not possess under the provisions of the Act
171 of March 10, 1900, or any other statute of the State of Kentucky, to make and fix a classification of freight traffic for and to be observed by complainant and the other railroad carriers operating lines in that State. They deny that said Commission did not have the power to make, fix, and adopt a classification of freight traffic for and to be observed by said carriers. They deny that said Commission by its said order or any other order changed or interfered with the rules and practices of complainant or any other railroad carrier without authority of law, and they deny that the acts of said Commission in that respect, or in any other respect, are either null or void.

Defendants say that complainant's and all other railroad carriers have heretofore adopted a plan for making rates. In accordance with this plan or basis, the many thousands of articles which they are required to transport and for the transportation of which rates must be made, are classified or grouped in such a way as to bring them together into one or the other of said classes or groups in order that each class or group may be subjected to the same charge for carriage. A rate is then fixed for each class or group, this being done to facilitate the making of rates and is but one of the elements and a part of the plan or basis for making same. As shown in complainant's local freight tariff designated "Table A" and in "Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Railroad Co.," complainant had, theretofore, adopted certain classifications or groups, to-wit: numbers 1, 2, 3, 4, 5, 6, and letters A, B, C, D, E, H, F, I, L, M, and N. Under these classifications or groups about three thousand five hundred (3,500) commodities are distributed and the rate upon each class or group is then fixed as shown in said tariffs, thereby fixing the rate for
172 the transportation of each commodity assigned to the several classes or groups. Defendants did not change complainant's plan or basis for making such rates, but, upon the contrary, adopted and approved the same as the most convenient form and method of making and fixing said rates, and the plan or basis thus adopted is nothing more nor less than making and fixing the rate.

Defendants deny that they, constituting said Commission, by said order, without authority of law, either under the said act or any other statute of the State of Kentucky, assumed the power and undertook to make, publish and establish a schedule of maximum rates on freight traffic for and to be observed by complainant and the other railroad carriers operating lines in that State; they deny that their said action was without authority of law and they deny that said action was either null or void.

Defendants deny that they, constituting said Commission, possess no power under said Act to make, publish or establish a schedule of maximum rates on freight traffic. They deny that they possess no power to require complainant or the other railroad carriers operating lines in Kentucky to observe the same. They deny that their power is limited to a case where, upon complaint, or their own motion, after notice and investigation, they find an existing rate is extortionate, they may, in lieu of the particular rate held by them to be extortionate, make, fix, and name a rate which they shall determine to be a just and reasonable one for like services thereafter rendered.

XXI.

Defendants deny that the reduction in complainant's rates ordered by said Commission, if put into effect, will directly, necessarily, or at all, interfere with, affect, or reduce complainant's existing
173 rates on interstate freight to and from stations on its lines in Kentucky or to and from stations on its lines and other lines outside of Kentucky. They deny that complainant's existing local rates in Kentucky enter into and form a part in most, or any, in-

stances of the existing through rates on such interstate or other shipments of freight belonging to the same or any classes. They deny that said Commission's order would reduce complainant's local rates in Kentucky on intrastate freight at least $150,673.74. They deny that said reduction would directly or necessarily result in reducing complainant's through rates on interstate shipments of freight or cause an annual loss to complainant thereon of not less than $50,000, or any other sum. They deny that the total reduction in complainant's revenue either directly or indirectly resulting from the order aforesaid would not be less than $200,000.00 per annum. Defendants deny that the changes in rates now in effect in Kentucky directed by said Commission in its order aforesaid, or any other order, would necessarily, or otherwise, result in the disturbance, alteration, or reduction of interstate rates now or for any time established on complainant's lines, or the lines of other interstate railroad carriers operating in Kentucky or other States. They deny that to put into effect said order or any other order heretofore entered by said Commission would be a direct regulation or any regulation of interstate commerce. They deny that same is or would be in violation of Clause three (3), Section eight (8) of Article one (1) of the Constitution of the United States. Defendants admit that Congress alone has the power to regulate interstate commerce, but they deny that said Commission has by said order or any other order undertaken to or has in any manner regulated or attempted to regulate interstate commerce. They deny that the State of Kentucky, or
174 the Railroad Commission of Kentucky, has not the power to so regulate or fix intrastate rates to and from points wholly within the State to be charged by railroad carriers which may, either directly or indirectly, affect the adjustment or division of rates by such carriers of interstate freight or traffic. Defendants deny that said order is in conflict with, or violates, the commerce clause of the Constitution of the United States, or with the interstate commerce act or the act of Congress of June 29, 1906, or any other act.

XXII.

Defendants deny that complainant's existing rates and charges in effect on its lines in the State of Kentucky and applicable to its intrastate freight business are not higher than is just or reasonable, whether considered with respect to the value of its property or investments used in the public service or devoted to such traffic or with respect to the value of the services rendered to the shippers or public generally. Defendants deny that complainant has the lawful right, as inherent to its business or otherwise as a common carrier of freight and passengers, to charge, and receive for the services rendered by it in the State of Kentucky more than just and reasonable rates. Defendants deny that complainant has any property right in the charging or collecting of rates that neither the State of Kentucky nor any governmental agency thereof can take from it or interfere with. Defendants deny that said Commission's order, if permitted to be put in force, will deprive complainant of its said property right without due process of law in violation of Section one of the Fourteenth Amend-

ment to the Constitution of the United States or any other section or amendment of said Constitution.

175 XXIII.

Defendants have not knowledge or information sufficient to enable them to form a belief as to whether the fiscal year ended June 30, 1904, June 30, 1905, and June 30, 1906, were the most prosperous years of any during the period complainant has operated its lines in the State of Kentucky. Defendants deny that during neither of said years did complainant receive from its existing rates on intrastate freight as much as a fair or just return on the value of its investments in that State devoted to the service of carrying that traffic. They deny that to put in effect said Commission's order providing reduced rates would not in any wise result in materially increasing the volume of intrastate freight over complainant's lines in Kentucky or its receipts from such traffic. They deny that complainant can not reasonably, or otherwise, expect any material increase in its gross earnings on such traffic upon its lines in that State to off-set the loss it will necessarily, or otherwise, sustain by reason of such reduction in its rates. Defendants deny that there will be any loss to complainant on account of such reduction. Defendants deny that to require complainant to operate its lines of railroad in Kentucky upon the rates fixed by said Commission's order for the return upon its actual value necessarily or otherwise resulting from the enforcement of said order is or will be a practical or other confiscation of the same or the use thereof. Defendants deny that such order or the enforcement thereof will deprive complainant of its property or any part thereof devoted to the carrying of intrastate freight in Kentucky without due process of law. They deny that same will operate

176 to take complainant's properties, or any part thereof, for public use without just compensation. They deny that it will deny to complainant the equal protection of the laws; they deny that same is, or will be, a violation of any of the provisions of the Constitution of the United States, and especially Articles five (5) and eight (8) thereof, and Section one (1) of the Fourteenth (14th) Amendment thereto, or any other article, section or amendment to said Constitution.

XXIV.

Defendants have not knowledge or information sufficient to enable them to form a belief as to whether complainant's officers, agents or employés, during the time it has operated and controlled its several lines of railroad in Kentucky, have managed the same honestly, skillfully, or economically, or as to whether they have used all reasonable efforts to procure passengers, mail, express, freight, and other intrastate traffic for transportation over the whole or any part of its said lines. They deny that complainant has charged and received for the transportation of intrastate freight and passenger traffic, mail, express, or other intrastate traffic over its several lines in Kentucky rates either just or reasonably low. They deny that such rates, or any of them, were allowed by law or by competitive

conditions or other circumstances affecting such traffic on each or any of said lines.

Defendants deny that complainant's existing rates are either just or reasonably low, either under existing competitive or other conditions or circumstances. Defendants say they have no knowledge or information sufficient to enable them to form a belief as to whether the taxes on complainant's railroad properties in Kentucky
177 have been only such as were claimed to be lawfully levied and assessed or were paid to maintain the operation of its said railroad properties in Kentucky, or that the rate of interest on its mortgage bonds resting as liens on its said properties in Kentucky was as low as it was possible to make it, or that the operating and other expenses have been kept down as low as possible, having in view the operation of trains and the proper maintenance and efficiency of said properties for public service, or that the supplies, material or labor used for these purposes were procured as cheaply as possible, or that the amount paid by it for general officers' salaries or for employes' wages on account of its several lines in Kentucky have been as low as practicable.

XXV.

Defendants deny that the system of rates heretofore and now being charged and collected by complainant in the operation of its several lines in Kentucky for the transportation of freight between points wholly within that State were or are just or reasonable in and of themselves for the service performed, and they deny that the same, with careful, skillful and economical management, will not hereafter produce, or that such have not heretofore produced, such an amount of revenue as will, while being just and reasonable to shippers or the public, yield more than a fair or just return upon the actual value of the railroad properties, rights or franchises situated in that State and devoted to the service of such shippers or the public in carrying intrastate traffic. Defendants deny that said Commission's order should not be sustained; they deny that should said order be allowed to go into force and effect, complainant can
178 not earn sufficient revenue on its railroad properties in Kentucky devoted to the transportation of intrastate freight or otherwise to yield a fair or just return upon their actual or other value. Defendants deny that unless enjoined, said Commission will claim that their said order is final or conclusive. They deny that they, constituting said Commission, will compel, or undertake to compel, complainant to submit to any unwarranted or ruinous reductions in its rates. They deny that by the enforcement of said Commission's order, complainant will be rendered unable to earn a fair or just return on the value of its investments or its railroad properties employed and used for the transportation of intrastate freight in Kentucky, or that its said railroad properties will be unable to pay operating expenses, taxes, cost of betterments, improvements, renewals, or interest on its bonded indebtedness.

XXVI.

Defendants deny that hundreds or thousands of indictments would be instigated by said Commission against complainant to recover excessive fines or penalties against it. They deny that the schedule of rates made and fixed by said Commission must or will be taken by the courts having criminal jurisdiction as final or conclusive. They deny that in all such, or any, prosecutions against complainant growing out of said order the Commonwealth of Kentucky will only have to produce the Commission's schedule of rates, prove that it was mailed to complainant or one of its officers, agents or employés, or that the rate charged, collected or received thereafter by complainant or one of its officers, agents or employés on any line of complainant in Kentucky between points in that State was in
179 excess of that fixed in the Commission's schedule of rates. They deny that without more, conviction would certainly or inevitably, or otherwise, follow.

Defendants deny that if complainant fails or refuses to accept and put into force and effect said reduction in its rates as prescribed in the Commission's order, they will cause to be instituted a multitude of prosecutions by indictment in each of the fifty-four (54) counties in Kentucky, through or into which complainant's lines run, to recover excessive fines or penalties imposed by said act. They deny that said act imposes either excessive fines or excessive penalties. Defendants deny that in the multiplicity of such legal proceedings, or in any proceedings, which complainant may seek to avoid, the same questions would be involved without any opportunity for the complainant or its officers, agents or employés to make a defense or show by evidence the unreasonableness or injustice of the rates fixed by the Commission, or that the merits of the defense justifying a failure or refusal to obey said order could not be tried in a court at law or court of criminal jurisdiction, or be fully or finally settled or determined otherwise than in a court of equity.

Defendants deny that they are or were threatening to carry out their said order by recommending and procuring numerous or other indictments against the complainant, its officers, agents or employés, on or after July 29, 1906, or any other time, to recover the fines or penalties prescribed by said act, or that they will do so unless immediately restrained and enjoined by this court from doing so. Defendants deny that complainant is not bound by said Commission's order.

XXVII.

180 Defendants deny that this case is a suit arising under the Constitution of the United States, to-wit: Section 4, Article 4, Articles 5 and 8, or Section 1 of Article 14 of the amendments to said Constitution, or under any other sections or articles of said Constitution. Defendants deny that under the rules of the common law, complainant can have remedy only in a court of equity. Defendants aver that should they recommend and should indictments or actions in the name of the Commonwealth be instituted to recover the penalties imposed by said act, complainant may, under the law, set up and

make any defense it may have under Section 4, Article 4, Articles 5 and 8, and Section 1 of Article 14 of the amendments to the Constitution of the United States, or under any other section of or amendment to said Constitution. Defendants deny that complainant is entitled to a temporary or other restraining order, or a writ of injunction against these defendants. Defendants deny that complainant is remediless in the premises at law, or that under the rules of the common law it can have adequate relief only in a court of equity.

Wherefore, these defendants having fully answered, confessed, traversed and avoided or denied all the matters in said bill of complaint material to be answered, according to their best knowledge and belief, humbly pray this Honorable Court to enter its decree that the defendants be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained, and
181 for such further and other relief in the premises as to this Honorable Court may seem meet, and in accordance with equity.

BENNETT H. YOUNG,
ROBERT H. WINN,
T. H. PAYNTER,
Attorney-at Law.

Clerk's Endorsement: Filed at Rules Nov. 5, 1906. W. G. Chapman, Clerk.

182 On a day following, to-wit, on the 3rd day of December, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
CHARLES C. McCHORD ET AL.

This day came the complainant, by its attorneys of record, and filed its replication herein.

The replication of complainant, referred to in the foregoing order, is in words and figures as follows, viz:

183 Circuit Court of the United States for the Eastern District of Kentucky.

Replication.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, ADAM T. SILER, and MCDOUGAL FERGUSON, Individually and as Constituting the Railroad Commission of the State of Kentucky, Defendants.

The Replication of the Above Named Complainant to the Answer of the Above Named Defendants.

This replicant, saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereunto, sayeth that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things, this replicant
184 is ready to aver, maintain, and prove as this honorable court shall direct, and humbly as in and by its said bill it has already prayed.

THOS. B. HARRISON, JR.,
District Attorney.
HENRY L. STONE,
General Counsel for Complainant.

Clerk's endorsement: Filed at Rules, December 3, 1906. W. G. Chapman, Clerk.

185 On a day following, to-wit, on the 7th day of January, A. D., 1907, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co.
vs.
CHAS. C. MCCHORD ET AL.

This day came the defendants, by their attorneys, and filed Exhibits A, B, C, & D, referred to in their answer, heretofore filed herein, to-wit, on Nov. 5, 1906.

Exhibits A, B, C, & D, filed with the answer of defendants, and referred to in the foregoing order, are in words and figures as follows, viz:

186 EXHIBIT "A" WITH ANSWER.

Appendix "A," Complaints, Notices, Etc.

OWENSBORO, KY., *Dec.* 21, 1904.

Mr. C. C. McChord, Frankfort, Ky.

DEAR SIR: Many towns in Kentucky have been discriminated against in the matter of freight rates as compared to the rates enjoyed by towns north of the river, and we think we have suffered a sufficient length of time on account of the unfavorable rates of freight. The railroads operating north of the river and west of the Mississippi river, as well as in the East, failed to agree with the roads south of the river some five years ago, on account of a dispute as to how much the railroads south of the river should receive as their percentage on hauling freight. The roads running out of Louisville to Owensboro combined with each other, and in writing agreed with each other that they would not accept less pay for hauling freight from Louisville to Owensboro than what would be coming to them on a short haul based on 190 miles; the actual difference being about 113 miles. The roads north of the river insisted that the roads south of the river had no right to demand pay for hauling freight 190 miles when the actual haul was only 113. Thereupon the roads south of the river withdrew from the traffic arrangement, and for the past five years we have paid local freights on all shipments originated east and north of Louisville on a basis of local to Louisville and basis of local from Louisville to Owensboro, or on a basis of local to Evansville, Ind., and Louisville from Evansville and to Owensboro, which puts this place, as well as all other towns south of the river that are included in that agreement, at a disadvantage. We are not able to compete for business successfully with either Louisville or Evansville. We claim that the rate is the same from Pittsburgh, Pa., or Cleveland, Ohio, to Paducah, Ky., that it is to Owensboro, and it is that the rates to Owensboro should not be any higher than to Louisville, or at least to Evansville, Ind. As the
187 matter stands the jobbers of this place are greatly handicapped, and there is really an agreement between the three roads entering Owensboro and the boat line on the river plying between Louisville and Evansville. The river has a differential allowed her because of the fact that she is a river, and the freight is not quite so excessive. As an illustration of the difficulties and disadvantages to the Kentucky towns and the South generally, I will cite you a few instances. By taking the railroad map, you can easily figure the distance from the points of shipment to the points of destination, and you will soon conclude, as we have concluded, that all of the territory south of the river is not being fairly treated by the transportation companies. For instance, we quote you from a letter dated Oct. 29, 1904, from a St. Louis manufacturing company, on window screen cloth, showing the rates to Owensboro, Beaver Dam and other Kentucky towns, and the rates to Indiana towns:

Owensboro	29	cts.	per	cwt.
Beaver Dam	60	"	"	"
Russellville	73	"	"	"
Central City	61	"	"	"
Hopkinsville	53	"	"	"
Bowling Green	81	"	"	"
Princeton	52	"	"	"
Uniontown	44	"	"	"
Morganfield	47	"	"	"
DeKoven	46	"	"	"
Drakesboro	64	"	"	"
Greenville	56	"	"	"

All the above in Kentucky.

Rockport	20	"	"	"
Grandview	25	"	"	"
Fulda, St. Meinrad, Jasper and Huntingburg	24	"	"	"
Chrisney	25	"	"	"

All the above in Indiana.

We likewise show you rates on screen wire cloth from Greensburg, Ind., to Indiana and Kentucky towns:

Owensboro	28½	cts.	per	cwt.
Beaver Dam	59½	"	"	"
Russellville	61½	"	"	"
Central City	60½	"	"	"
Hopkinsville	62½	"	"	"
Bowling Green	61½	"	"	"
Princeton	62½	"	"	"
Uniontown	43½	"	"	"
Morganfield	49	cts.	per	cwt.
DeKoven	50	"	"	"
Drakesboro	61½	"	"	"
Greenville	60½	"	"	"

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Indiana Towns:

Rockport	25	To	Evansville.
Grandview	25	"	"
Fulda	25	"	Lincoln.
St. Meinrad	35	To	Ferdinand.
Jasper	25		
Huntingburg	25		
Chrisney	25		

On poultry netting from Joilet and Dekalb to Kentucky and Indiana towns:

Kentucky towns:

Owensboro	24	cts.	per	100	pounds.
Beaver Dam	45	"	"	"	"
Russellville	53	"	"	"	"
Central City	52	"	"	"	"
Hopkinsville	53	"	"	"	"

Bowling Green	53	cts.	per	100	pounds.
Princeton	38	"	"	"	"
Uniontown	42	"	"	"	"
Morganfield	32	"	"	"	"
DeKoven	32	"	"	"	"
Drakesboro	53	"	"	"	"
Greenville	38	"	"	"	"

Indiana towns:

Rockport, Grandview, Fulda, St. Meinrad, Jasper, Huntingburg, Chrisney, all 20 cents..

If it is in the power of the Commission to regulate rates, we think that the railroads should be asked first, and then, if they refuse to concede the rates that the Kentucky shippers are entitled to, they should be forced to give rates that are fair and just, that they are not doing, now.

Yours truly,

W. A. GUENTHER & SONS,
By J. ED GUENTHER.

OWENSBORO, KY., *Dec.* 26, 1904.

Mr. C. C. McChord, Chairman Railroad Commission, State of Kentucky, Springfield Ky.

DEAR SIR: We are in receipt of your favor of December 24th, and would be pleased to have you call and see us. I would urge strongly the necessity of having some competent and ex-
189 perienced railroad clerk in your employ compile the railroad rates existing now on all classes of freight and to all points within the State as compared to the rates on the same commodities and freights to points in other States where the length of the haul is similar and the services rendered about the same. Kentucky can not go forward as rapidly as she is entitled to move if she is held back by everything that comes in contact with her. I notice that Gov. LaFollette, of Wisconsin, is giving the railroad companies food for reflection. I saw quite an article on that subject in the Christmas number of the St. Louis Republic. There is no question in my mind but what the amount of abuses existing in Kentucky to-day, that if the Railroad Commission get after these matters vigorously much of the imposition now being practiced on the people in this State will be abated. Understand I do not believe that the railroads should carry freight at less than a fair rate of compensation for the money invested in their enterprise or cost of operating, and I do not believe that people on the south side of the Ohio River should pay freight two to four times as much for the same service rendered by railroads as they would have to pay if they lived on the north side of the river, or somewhere east. I would suggest as one of the means of getting at this matter, that your Commission get the tariffs, schedule, classification books, and rate books from the railroad companies in the various States, and would suggest that you take the Atlantic States, as a group, Pennsylvania, New York, Ohio, Indiana, Illinois, Michigan, and Wisconsin, and so on, measure

the distance and make a table put up in a more tabulated form, showing at a glance the difference charged for hauling the various kinds of freight per ton per 100 miles in other States and in the State of Kentucky. I presume, of course, that you have some system already inaugurated, but as very little progress seems to have been made with the railroads in this State towards regulating charges they make for traffic, I take it that either the Railroad Commission has not been as vigorous as they could have been, or either they have not received the support they are entitled to as a working body who are expected to work for the interests of the people of the State.

Yours truly,

W. A. GUENTHER & SONS,
By J. ED. GUENTHER.

190 OWENSBORO, KY., *Dec.* 29, 1904.

Mr. C. C. McChord, Springfield, Ky.

DEAR SIR: Referring again to the matter of freight rates to Kentucky towns as compared to rates to towns north, east, and west of the river, I note that the number of States that you are making comparisons in. I suggest that you cannot make a good and sufficient comparison unless you take the rates prevailing on the roads operated in New York, Pennsylvania, Ohio, Indiana, Michigan, and Wisconsin, making comparison carefully for the number of miles and the exact kind of freight transported in each of the States as compared to the transportation in the State of Kentucky. I really believe, and firmly believe, that on account of the population in the State of Kentucky and the number of railroads in the State, that we are entitled to some consideration and the same rates of freight enjoyed by the people north of the river. I really would not consider a comparison of our freight rates with those of the Southern States a fair comparison so far as Kentucky is concerned. I would like very much to have some of your comparisons of freight rates charged in other States and in Kentucky, and would suggest that after fully satisfying yourself as to the constancy as well as the fidelity of some of the representative business men of the States who are familiar with transportation matters, that you give them some information of what you want, and have them assist you in getting some of the information required. If consistent I would like to have copies of some of the comparisons, as I might be able to render you some assistance.

Yours truly,

J. ED. GUENTHER,
With W. A. Guenther & Sons,
and Blue Grass Canning Co.

191 OWENSBORO, KY., *Dec.* 29, 1904.

Mr. C. C. McChord, Springfield, Ky.

DEAR SIR: I am pleased to acknowledge receipt of your report of opinions and rules of the Railroad Commission governing car service and demurrage charges on all railroads in Kentucky. I note a

contention was made and appears to be omitted that 48 hours is a reasonable length of time in which to unload a car of freight. A car of freight in many instances can be unloaded in that length of time, but the writer has had some experience, and has paid a number of dollars out on unloading tin cans at the Blue Grass Canning Factory in this city. Cans invariably come in large furniture cars, sometimes as many as 110,000 cans in one car. They come stacked loose in the car. This kind of freight compels careful handling. It requires from three to four full days to unload one car of these cans with the best force you can get together that can work economically at the work, yet we have been compelled to pay demurrage repeatedly on such cars. The fact appears to have been lost sight of by the shippers who brought the action against the Louisville Car Service Association and other associations that a minimum car weight was 24,000 lbs. Now the minimum weight is 30,000 to 40,000 lbs., and the actual weight runs from 40,000 to 100,000 lbs. to the car. In fact, the transportation companies make a lower rate from the Pittsburgh districts on wire and nails on cars weighing 40,000 pounds and over than they do for that number of pounds. We formerly had no difficulty with a two-horse team, a light spring wagon that would carry 3,600 pounds weight to unload a car in about two days. We changed our wagons and made them heavier, and have more difficulty now in unloading a car than at that time when we had lighter wagons. Cars seldom reach us with roofing, wire, nails and goods of that description with less than 40,000 lbs. in a car, and the cars frequently run as high as 65,000 lbs. The same is true with cars of lumber. By the way, we are not in the lumber business now; but with the very large cars that the railroad companies have now put into use, it is quite a difficult problem for lumbermen who have to haul the lumber, as he often
192 does, a distance of from one to two miles from some depot, to unload a car. I know that in Cincinnati, Ohio, the time allowed for unloading a car is three days, and the car service companies are nothing like as rigid in enforcing their rules as the Louisville Car Service Association is. I really think that in view of the fact that the size of the cars has been greatly increased, that the time limit be extended to at least three days, or that two days be allowed for 30,000-lb. cars, 2½ days for 40,000-lb. cars, 3 days for 50,000-lb. cars, and 3½ days for 60,000 lbs., and the time increased according to the number of pounds in the car. It is entirely unfair for the Car Service Association to be permitted to compel the consignee to pay demurrage or car service on heavily loaded cars. While we have plenty of teams to do our work, we are frequently compelled to hire outside teams, which, of course, is unprofitable, in order to unload freight within the time limit. It seldom happens that we will get a car load of freight in by the L., H. & St. L., one or two more cars by the I. C., and still another car by the L. & N., all of them arriving at once, which no amount of management or reasonable number of teams can we unload these cars within two days' time. We note that you have a clause on the bunching in transit of cars, and that the consignee be allowed additional time, but the railroad companies and their agents here do not construe

the meaning of that clause except where the cars are bunched on their own road, and up to this time we have always paid demurrage on cars where they remain on the track of any transportation company longer than 48 hours after their arrival here and notice to us of their arrival. If this city should have twelve different cars he would be compelled to pay demurrage if he were unable to unload them within forty-eight hours from the time of notice. I suggest that the features in the above be taken up, and that the shippers and receivers of freight be allowed additional time in proportion to the weight of the car and the number of cars received as a total by the various transportation companies in any one day.

Yours truly,

J. ED. GUENTHER,
With W. A. Guenther & Sons.

193 OWENSBORO, KY., *Jan.* 13, 1905.

Mr. C. C. McChord, Louisville, Ky.

DEAR SIR: Rate on fence wire, nails, horseshoes from Pittsburgh to Owensboro, Henderson, Ky., car loads and less than car loads, are as follows:

Owensboro and Henderson	21	25½
Hopkinsville	31	47
Cloverport	22	26
Beaver Dam	41½	46
Bowling Green	34	41
Horse Shoes and Plates to Bowling Green, Ky., car load	41½	less than car load 50
Barb Wire, Bowling Green, Ky	36½	45

You will observe right here that the rate made to Owensboro and Henderson is on bars, plates, fence wire, plain or barbed, nails and horse shoes all the same rate, but to Bowling Green there is three separate and distinct rates of freight on the same merchandise. On wire, bars, plates, and horse shoes, 33, 47. These rates are very recent rates, in fact have been made since October 15th, 1904. Previous to that time the rates were considerably higher than the above rates, while previous to that time the rates to Louisville was slightly less than it was at that time. Just now the rate to Louisville is 16½ car load, and 20 less than car load.

Rate to Rockport, Ind., directly across the river from Owensboro is now 18½ and 22½, and previous to the issuing of schedule No. 9, Jan. 1st, '04, the rate was 17 and 20, while at the same time the rate to Owensboro was 24 and 28.

Rate to Russellville, Ky., 41½ and 50.

Yours truly,

W. A. GUENTHER & SONS,
By J. ED GUENTHER.

OWENSBORO, KY., *Jan.* 15, 1905.

Mr. C. C. McChord, Louisville, Ky.

DEAR SIR: I understand that you are to appear before the Interstate Commerce Commission at Washington, D. C., and while
194 there I request you to present some of the conditions as they prevail in Kentucky to-day. For instance, the rate of freight from New Orleans or Mobile or any point between Evansville and Louisville on the Southern Railroad is the same price per 100 pounds. Coming from Michigan and Wisconsin in the North, the rate of Louisville and Evansville is almost exactly the same, and in some instances exactly the same. Owensboro and Henderson lie between Evansville and Louisville. The rate of freight to almost every point in this section of the country is gauged not by a fair and just rate, but by the amount the transportation companies can compel the public to pay for the service rendered. About five years ago we had what we considered at that time reasonable rates. Then the rates were higher than Louisville and higher than Evansville. About that time the railroads south of the Ohio river leading into Owensboro made a demand on the roads north of the river and west of the river, demanding that they pay them for hauling freight from Louisville, Ky., to Owensboro on a basis of 190 miles haul. The distance traveled by the L., H. & St. L. is 113 miles, and by the I. C. about 128 miles. The northern railroads very naturally declined to enter into that kind of an agreement, as they stated that it was not fair.

In order to enforce their demands, the L., H. & St. L., the I. C. and the L. & N. entered into an agreement and each of the parties signed the agreement, stating that neither of them would take freight for Owensboro unless the roads delivering the freight to them would pay them on a basis of 190 miles hauling on a through basis. Up until very recently, on account of this arrangement, the roads north of the river declined to treat with the roads south of the river on the through rate. The result is that Owensboro, Henderson and other towns in this section have been compelled to pay two local rates. One local rate to Evansville or to Louisville, whichever point the freight happened to come into, and another local freight to Owensboro. To show you how long it takes the railroads to fix up a difference, they have repeatedly promised to restore the old rate of freight
195 from the West. Peoria, Davenport, Dubuque, Joliet, Ottumwa, Iowa, have never been adjusted up to this good hour, and the rates from these towns to this place consequently are excessively high. We have been assured by the railroad companies from time to time that these matters would be adjusted. But they have only promised and not performed.

During the five years that this agreement between the roads failed to agree, north of the river and east and west of the river, has been enforced, I venture to say upon investigation, that the additional amount of money collected from Owensboro on inbound freight alone would amount to more than $250,000 greater than if the rates prevailing previous to five years ago had been in force and effect. You can readily see from this that by reason of this agreement and

what the roads could get out of the business, that it is natural that they should want to continue it and not be disturbed from what is netting them very large returns, while the dear public are paying tribute to the parties who are mistreating them, and it simply shows how long the public are getting what is justly due them.

I urge very strongly the importance of having the Interstate Commerce Commission given power by Congress, the Senate and the President of the United States, that will enable them to fix rates immediately, and have that rate maintained after being fixed until such time that the courts who have jurisdiction at the nearest point that is affected have time to pass upon the rate and say whether it is right or wrong. If our differences must be carried up to Washington to have them adjusted you can readily see that smaller shippers will not present their claims, and will not be represented as they would be if the action be brought at the residence or near the place of residence of the parties who had the rate corrected because of the overcharge being made by the railroad companies. We want relief and, in fact, the people of the United States want relief, and there is hardly a man in the country that does not want the railroad company to be paid a fair and just rate of freight on all merchandise, or anything else for that matter, that they haul, but this thing of charging four cents per
100 pounds for handling wheat or corn from St. Louis to
196 Louisville, and charging six and eight cents to haul that same
grain from St. Louis to Owensboro is unfair. This was the case for a considerable length of time, but a short while ago the railroads have given Owensboro the same rate of freight on wheat and corn from St. Louis to Owensboro as the rate that had been prevailing from St. Louis to Louisville. To-day the rate of freight from Owensboro to Louisville or from Owensboro to St. Louis on a car load of grain is higher than it is from St. Louis to Louisville, when the haul in either instance would be practically one-half the distance as hauled from St. Louis to Louisville.

I hand you herewith some comparative rates from Cincinnati, Ohio, Erie, Pa., Joliet, Ill., Greensburg, Ind., and St. Louis, Mo., on merchandise that we are interested in, showing that the people in this State are not being given just and equitable rates by the transportation companies, and that people who live in Indiana and Ohio enjoy very much lower rates on the same commodities hauled the same distances, the number of railroads no larger, the population no larger than any similar territory in this State. Yet in this State we pay two, three and four times as much for hauling the same commodities as the people on the other side of the river, and for the same service hauled the same distance.

I trust you will pardon this long letter, but it seems necessary to get out the facts in order to enable you to lay your views and my own before the Commission.

Yours truly,

J. ED GUENTHER.

Blasting Powder from Coes, Ohio, to:

	400 Keg 10,000 lb. lots.			800 Keg 20,000 lb. lots.		
Drakesboro, Ky.	92	cts.	cwt.	92	cts.	cwt.
Central City, Ky.	79	"	"	79	"	"
Island, Ky.	80	"	"	80	"	"
McHenry, Ky.	79	"	"	79	"	"
Deanefield, Ky.	77	"	"	77	"	"
Spottsville, Ky.	64	"	"	59	"	"
Owensboro, Ky.	55	"	"	42	"	"
Henderson, Ky.	50½	cts.	cwt.	43	"	"
Clay, Ky.	89	cts.	cwt.	89	"	"
DeKoven, Ky.	73	"	"	73	"	"
Uniontown, Ky.	60	"	"	60	"	"
197 Madisonville, Ky.	89	cts.	cwt.	89	cts.	cwt.
Earlington, Ky.	74	"	"	66	"	"
Empire, Ky.	96	"	"	96	"	"
Hillside, Ky.	79	"	"	79	"	"
Greenville, Ky.	84	"	"	84	"	"
Troy, Ind.	43	"	"	36½	cts.	cwt.
Evansville, Ind.	43	"	"	36½	"	"
Booneville, Ind.	43	"	"	36½	"	"

From St. Louis.

The rates of freight on window screen cloth to the following points:

Owensboro	$0.29	per	cwt.
Beaver Dam	.60	"	"
Russellville	.73	"	"
Central City	.61	"	"
Hopkinsville	.53	"	"
Bowling Green	.81	"	"
Princeton	.52	"	"
Uniontown	44	"	"
Morganfield	.47	"	"
DeKoven	.46	"	"
Drakesboro	.64	"	"
Greenville	.56	"	"

All the above in Kentucky.

Rockport	$0.20	per	cwt.
Grandview	.25	"	"
Fulda	.24	"	"
St. Meinrad	.24	"	"
Jasper	.24	"	"
Huntingburg	.25	"	"
Chrisney	.25	"	"

All the above in Indiana.

Rates on poultry netting, less than car load, from Joliet to the following:

Kentucky.

Owensboro	34c.	per	100	lbs.
Beaver Dam	45c.	"	"	"
Russellville	53c.	"	"	"
Central City	52c.	"	"	"
Hopkinsville	53c.	"	"	"
Princeton	38c.	"	"	"
Uniontown	42c.	"	"	"
Morganfield	32c.	"	"	"
DeKoven	32c.	"	"	"
Drakesboro	53c.	"	"	"
Greenville	38c.	"	"	"

198 Indiana.

Rockport	20c.	per	100	lbs.
Grandview	20c.	"	"	"
Fulda	20c.	"	"	"
St. Meinrad	20c.	"	"	"
Jasper	20c.	"	"	"
Huntingburg	20c.	"	"	"
Chrisney	20c.	"	"	"

OWENSBORO, KY., *Jan.* 14, 1905.

Mr. C. C. McChord, Washington, D. C.

DEAR SIR: While before the Commission I would suggest that you move them in writing to consider a universal classification for all kinds of goods transported, whether by rail or water, in the United States of America. You know the difficulty that all shippers experience in getting a proper rate. As an illustration, for instance, the classification of Bowling Green, Ky., on the L. & N. Railroad, on nails and bars, car loads 34 cents, less than car loads 40; plain fence wire, car loads 34, less than car loads 41; on barbed fencing 36½ car load, and less than car load 45.

On horseshoes and plates, car loads 41½, less than car loads 50. On iron bars, car load rate 35 cents, less than car loads 45½, while to Owensboro, Ky., the classification is exactly the same on all of these items. That is, there is one classification covering the entire line. To Central City, Ky., which is also on the L. & N. and on the I. C., to the classification on nails, bars, plain wire, barbed wire, horseshoes and plates the rate is exactly the same on all of these, 41½ and 50.

I merely cite these two cases to show you how mixed up matters are at this time, and how thoroughly unsatisfactory the classifications are of the various transportation companies.

Yours truly,

W. A. GUENTHER & SONS,
By J. ED GUENTHER.

199 OWENSBORO, KY., *Feb.* 3, 1905.

Mr. C. C. McChord, Frankfort, Ky.

DEAR SIR: I have evidence that discrimination is being practiced by the railroads in the favor of some shippers to the exclusion of others, and I also state that the rates of freight to Owensboro and from Owensboro are not just and fair as charged by the railroads entering here and doing business in the territory surrounding Owensboro, and I move you to have an investigation of matters as they exist here at the present time.

Very respectfully,

J. ED GUENTHER.

SPRINGFIELD, KY., *February* 13, 1905.

Mr. J. Ed Guenther, Owensboro, Ky.

DEAR SIR: A meeting of the Commission will be held at Owensboro beginning at 9 o'clock A. M., February 27th, for the purpose of hearing and determining your complaint against the L. H. & St. L., L. & N. and I. C. Railroad Companies. I enclose blank subpœna which you are at liberty to fill out with the names of such witnesses as you may desire to have summoned to appear and testify before the Commission on this occasion. Trusting that all parties in interest will be ready to proceed at the time indicated, I beg to remain,

Yours very truly,

C. C. McCHORD,
Chairman.

P. S.—The Commission will be obliged to you if you will arrange for some convenient place for this meeting.

SPRINGFIELD, KY., *February* 13, 1905.

Mr. T. B. Harrison, Jr., District Attorney L. & N. R. R. Co. Louisville, Ky.

DEAR SIR: For your information I enclose herewith copies of communications received from Mr. J. E. Guenther, of Owensboro, Ky., wherein the complaint is made that all rates, both intra
200 and interstate, charged by the Louisville & Nashville Railroad Co. for the transportation of commodities to and from points in Kentucky, as well as similar charges by all other railroads entering the city of Owensboro, are extortionate.. Complainant also avers that under the present adjustment of interstate rates from official classification territory, that is to say, from all points east of the Mississippi and north of the Ohio and Potomac Rivers to points south of the Ohio River, is unjust and unreasonable. He complains that on all traffic moving from official classification territory to points south of the Ohio River in the State of Kentucky the practice of adding full local rates to the through rate applying to the Ohio River renders the rate so charged unjust, unreasonable and extortionate. Complying with complainant's request a meeting of the Commission will be held in the city of Owensboro, Ky., beginning at 9 o'clock

A. M., February 27, 1905, at which time and place the complaint will be fully heard and determined. Representatives of the other railroads affected by this complaint have also been notified.

Yours very truly,

C. C. McCHORD,
Chairman.

The preceding letter was also addressed to Mr. L. J. Irwin, General Freight Agent, L. H. & St. L. Ry., Louisville, Ky., and Mr. C. C. Cameron, G. F. A., I. C. Railroad Co., Memphis, Tenn.

201 *In the Matter of Shippers of Owensboro, Ky., and Others for a Reduction of Freight Rates Before the State Board of Railroad Commission.*

J. ED. GUENTHER, ETC.,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO., SOUTHERN RAILWAY COMPANY IN KENTUCKY, CHESAPEAKE & OHIO RAILWAY COMPANY, LEXINGTON & EASTERN RAILROAD COMPANY, LOUISVILLE, HENDERSON & ST. LOUIS R. R. CO., LOUISVILLE & ATLANTA RAILROAD COMPANY, AND ALL OTHER RAILROADS THAT OPERATE THEIR LINES IN THE STATE OF KENTUCKY.

Amended Complaint.

By leave of the Commission, the complainants in the above styled proceeding, amend their original complaint as follows:

They make the railroads designated in the caption of this amended complaint parties defendant hereto, and ask that they be served with such notice as the law directs and that they be required to answer the complaint of J. Ed Guenther, etc., as originally preferred and as charged in this amended complaint.

I. The complainants aver and charge that all local freight rates from and to all local points in the State of Kentucky as fixed and charged by the defendant railroads on all classes of freight are excessive, discriminatory and extortionate.

II. The complainants aver that the local rates of freight as fixed, maintained and charged by the defendants herein, are exorbitant, excessive and extortionate. They say some of the rates are
202 excessive; that many of them are extortionate; and all of them discriminate in favor of some local communities as against other local communities, and that rates charged and maintained by defendant companies are in open violation of law, against public policy, illegal and extortionate.

III. Complainants further state that the local rates fixed, maintained and charged by defendant railroads throughout the State of Kentucky are not uniform; that they do not treat each local community with fairness or equitably, but the rates are arbitrarily fixed and maintained so as to build up a community or discriminate against it at the pleasure of defendant companies.

Your complainants, in support of this amended complaint, file herewith and make part of it a table which is attached to their brief already filed in this proceeding, which table of comparative rates is denominated "Comparison of Local Rates." They make that table a part of this amended complaint and ask that it be considered by your Honorable Commission as though the table was written out *in extenso* herein.

Complainants also file and make part of this amended complaint a table designated as follows: "Table of Comparative Rates of Local Mileage—Scale Basis," which table was offered in evidence at the hearing had before your Honorable Board at Owensboro, Ky., and which constitutes a part of the proof in the record before your Commission.

IV. Complainants amend their original complaint herein to conform to the proof already taken by both the complainants and the defendants, so as to make it specifically cover all local freight rates charged by each and every railroad company operating a line of railroad in the Commonwealth of Kentucky, and so as to make their complaint conform to the evidence herein.

Wherefore, your complaints pray this Honorable Commission, not only to revise the local freight rates in and out of the city of Owensboro, but to revise and adjust the rates between all local points from and to every local point throughout the entire State of Kentucky, and on final hearing they pray for all relief to which they are entitled, both at law and in equity.

SWEENEY, ELLIS & SWEENEY,
Attorneys for Complainants.

203 SPRINGFIELD, KY., *Aug.* 17, 1905.

Mr. T. B. Harrison, Jr., District Attorney, L. & N. R. R. Co., Louisville, Ky.

DEAR SIR: Your favor of the 11th inst. to our Secretary, Mr. M. R. Glenn, requesting that he send you copy of amended complaint filed by Owensboro shippers, has been referred to me. Complying with your request I enclose herewith copy of the amended complaint with copies of the exhibits made part of the amended complaint and therein referred to. I have not forwarded these copies to you or to the representatives of the other railroads of the State for the reason that the Commission had not determined just when it could take the matter up. I am now directed by the Commission to advise that a meeting will be held at the office of the Commission in the city of Frankfort, Ky., beginning at 11 o'clock A. M., September 20th, at which time and place, and continuing until the investigation of this complaint shall be fully heard and determined. I believe you have a carbon copy of the evidence and proceedings had upon the several hearings at Owensboro, together with a copy of the original complaint heretofore forwarded to you, which, together with the copies now enclosed, will advise you of the nature of the matters to be inquired into.

Yours very truly,

C. C. McCHORD, *Chairman.*

SPRINGFIELD, KY., *Aug.* 17, 1905.

Mr. G. B. Wall, Real Estate Agent, C. & O. R. R., Richmond, Va.

DEAR SIR: For your information, I enclose herewith copy of amended complaint with exhibits thereto attached and therein referred to, filed by the shippers of Owensboro, Ky., against your company and all other railroads in the State of Kentucky, wherein it is alleged that all rates to and from all points within the State charged, collected and received for the transportation of all commodities are unjust, unreasonable, discriminating and ex-
204 tortionate. I am directed by the Commission to advise that a meeting will be held, beginning at 11 o'clock A. M., September 20th, at the office of the Commission in the city of Frankfort, Ky., at which time and place and continuing from day to day, subject to such adjournment as may be deemed necessary to suit the convenience of the parties until said complaint shall be fully heard and determined.

Yours very truly,

C. C. McCHORD, *Chairman.*

The above letter was also addressed to the following railroad officials:

Mr. C. C. Cameron, G. F. A., Illinois Central R. R., Memphis, Tenn.

Mr. L. J. Irwin, G. F. A., L. H. & St. L. Louisville, Ky.

Mr. G. P. Biles, G. F. A., C. N. O. & T. P. R'y Co., Cincinnati, O.

Mr. J. Rogers Barr, General Manager, Lexington & Eastern R'y, Lexington, Ky.

Mr. James P. Amsden, President, L. & A. Railway, Versailles, Ky.

Mr. R. J. Curran, Ass't G. F. A., Southern R'y Co. in Ky., Louisville, Ky.

All of these letters were forwarded by registered mail on the 17th of August, 1905, except the ones to Mr. L. J. Irwin and Mr. James P. Amsden, which were forwarded some time later along, also by registered mail.

SPRINGFIELD, KY., *Aug.* 25, 1905.

Hon. W. T. Ellis, Owensboro, Ky.

MY DEAR CAPTAIN: As explained to you over the telephone some days ago, we find it necessary, in order to give the proper notices to the railroads, to have copies made of the tables which were made part of the amended complaint filed by you as attorney for the Owensboro shippers. It is our desire to fix as early a date as possible for this hearing; however, in view of other engagements, we find that the earliest date would be September 20th, and notices have been given the various railroad companies accordingly. I thought
205 I had written you several days ago, but on account of accumulation of other matters and an absence from the office until now, I find that I have failed to do so.

Yours very truly,

C. C. McCHORD, *Chairman.*

LOUISVILLE, KY., *Sept.* 7, 1905.

Secretary Railroad Commission, Frankfort, Ky.

DEAR SIR: We have some clients who are heavy shippers of freight and who desire to be made parties complainant in the matter now pending, styled J. Ed Guenther *et al. v.* L. & N. R. R. *et al.*

We saw Mr. McChord here yesterday and mentioned the matter to him. He said that you would send us a copy of the amended complaint in above matter if we would write you.

We are very anxious to have this at once and would greatly appreciate it if you would send it to us.

Thanking you in advance,

Very truly,

CHANDLER & NORMAN.
By J. V. N.

LOUISVILLE, KY., *Sept.* 13, 1905.

Mr. Moses R. Glenn, Sec., Frankfort, Ky.

DEAR SIR: Please accept our thanks for the copy of amended petition in Guenther, etc., *v.* L. & N. R. R. *et al.*, which you sent us on Sept 8th. We certainly appreciate your kindness.

We enclose herewith complaint and petition to be made parties on behalf of our clients. We wish you would file this in your office and notify the Commission that same has been filed.

We will be present on October 3rd when the hearing begins.

Again thanking you for your kindness,

Very truly,

CHANDLER & NORMAN,
By J. V. N.

206 Kentucky Railroad Commission.

J. Ed GUENTHER, ETC., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY IN KENTUCKY, ILLINOIS CENTRAL RAILROAD COMPANY ET AL., Defendants.

Complaint of Norman Lumber Company, Louisville Veneer Mills, Calloway Lumber Company, etc., and petition to be made parties.

Complaint.

Petitioners, Louisville Veneer Mills, Norman Lumber Company and Calloway Lumber Company, say that they are residents of the State of Kentucky, and are engaged in shipping lumber, logs, ties, and all lumber commodities from point to point, in the State of Kentucky, over the railroads owned, controlled and operated by the defendants in the State of Kentucky, and that they are directly affected by the rates and classifications of freight to and from all points in said State.

I. Petitioners aver and charge that all local freight rates from and to all points in the State of Kentucky on all commodities as fixed and charged by the defendant railroads, are excessive, and extortionate, and that the freight classifications are discriminatory and extortionate.

II. Petitioners aver and charge that the rates and classifications on lumber, logs, ties, and all timber commodities, to and from all points in Kentucky, are especially extortionate, discriminatory and unreasonable.

III. Petitioners further state that the rate on railroad or cross-ties from non-competitive points to all other points in the State of Kentucky is fixed by the defendants so that it amounts to con-
207 fiscation, and prevents the producer or owner of said railroad or cross-ties from getting them to any open market, and compels him to sell them to defendants or one of them, at whatever price they or one of them may see fit to offer, and that said practice is extortionate, confiscatory and unconscionable.

IV. Petitioners further aver that the rate on cherry, walnut and cedar timber, lumber and logs, to and from all points in Kentucky, is fixed by defendants three cents per hundred pounds higher than the rate on all other classes of timber, logs and lumber to and from said points in Kentucky, and that there is no sound or legal reason for said increased charge on cherry, walnut and cedar timber, logs and lumber, and that same is unjust, discriminatory and extortionate.

V. Petitioners state that they are required by defendants to furnish the necessary standards and sidings for the loading of logs on flat cars, and that no allowance is made them for the freight on same; that said standards and sidings are a necessary part of the equipment for hauling logs, and that defendants should either be required to furnish same or should be required to give petitioners a reasonable reduction on the weight of the shipment sufficient to cover the weight of said standards and sidings; that it is unreasonable and extortionate for defendants to require them to furnish said standards and sidings and then compel your petitioners to pay freight on same.

VI. Petitioners join in all the allegations of the original and amended petitions herein, as though fully set out herein.

Wherefore, petitioners pray to be made parties complainant herein, and that allegations made in this complaint be tried at the hearing herein; that the rates in Kentucky on lumber, logs ties, and all timber products be revised and adjusted; that all rates on all commodities in Kentucky be reviewed and revised; pray as in the amneded petition herein, and for all further and proper relief to which they may be entitled in law or equity.

CHANDLER & NORMAN,
BENNETT H. YOUNG,
Att'ys for Complainants.

208 FRANKFORT, KY., *Sept.* 16, 1905.

Judge A. E. Richards, Vice-President, Louisville & Atlantic Railroad, Louisville, Ky.; Mr. L. J. Irwin, General Freight Agent, L., H. & St. L. Railway, Louisville, Ky.; Mr. C. Scott, General Freight Agent, Lexington & Eastern Ry., Lexington, Ky.; Judge Alex P. Humphrey, General Counsel, Southern Railway in Kentucky, Louisville, Ky.; Mr. W. F. Hite, A. G. F. A., C. & O. Railway, Huntington, W. Va.; Mr. G. B. Wall, Real Estate Agent, C. & O. Railway, Richmond, Va.; Messrs. Trabue, Doolan & Cox, District Attorneys, Illinois Central Railroad, Louisville, Ky.; Mr. T. B. Harrison, Jr., District Atty., Louisville & Nashville Railroad, Louisville, Ky.; Mr. G. P. Biles, G. F. A., C., N. O. & T. P. Ry., Cincinnati, Ohio; Mr. Geo. B. Knox, G. F. A., N., C. & St. L. Ry., Nashville, Tenn.

DEAR SIR: Herewith enclose petition of the Norman Lumber Company, Louisville Veneer Mills, Calloway Lumber Company, etc., to be made parties to complaint of J. Ed Guenther, etc., against all railroads in Kentucky. I am directed by the Commission to advise that the hearing of this petition will be taken up with the complaint of J. Ed Guenther, etc., on October 3d, 1905, at the office of the Commission, Frankfort, Ky.

Yours very truly,

MOSES R. GLENN,
Secretary the Railroad Commission.

209 The following communication was furnished by J. Ed Guenther to the Chairman of the Commission.

OWENSBORO, KY., *Sept.* 22, 1905.

Mr. C. B. Compton, Traffic Manager, Louisville, Ky.

DEAR SIR: Referring to conference held with you on the 16th and also to-day, with reference to the adjustment of rates between Owensboro, Ky., and the territory governed by what is known as Central Freight and Trunk Line Association, would say, after having given the subject a great deal of thought, and after consultation with interested parties, we have decided to make the following proposition; it being first understood, however, that in the event the transportation companies see fit to reject same, this proposition is to be treated as strictly confidential, and not to be used or considered in any way as an acknowledgment or admission that we do not feel and contend that Owensboro is entitled to the same rates as are enjoyed by Evansville from and to territory heretofore referred to.

We will accept, as a basis for making rates between Owensboro and the territory east of the Indiana and Ohio boundary, the following:

	Classes.					
	1	2	3	4	5	6
Arbitraries over Evansville.....	3	3	2	2	1	1
And west of the Indiana and Ohio boundary line the following arbitraries over Evansville..	4	3	3	2	2	2

We make the proposition and propose to settle on this basis simply as a matter of policy, and with the hope that we will be able to convince you later that our position is correct, and that we are entitled to the Evansville basis. We will expect to take up with you later the subject of rates and service to Green River territory, and rates from Owensboro to local stations upon the Henderson Division of the L. & N. and I. C. Railroads, and any other rates which we believe to be unjust, and discuss them with you in a spirit of frankness, and ask for an equitable adjustment of any
210 of these rates that we will be able to show you are out of line.

Assuming that this proportion is acceptable, we propose to withdraw all suits now pending in regard to intra and interstate rates.

We believe we are meeting you more than half way with this proposition, but, to remove these cases from the courts, and trusting that in future Owensboro will receive more consideration at the hands of the transportation companies than she has in the past, we are willing to settle the matter on this basis.

Trusting that you will meet us in the same spirit on a common ground of community interests, we believing that the transportation companies and the manufacturers and shippers of Owensboro are mutually interested in any thing tending to the advancement and welfare of the commercial interests of Owensboro, I am,

Yours truly,

J. E. GUENTHER, *Chairman.*

The following communication was filed with the Commission by Attorney General N. B. Hays, Oct. 3, 1905:

In the Matter of the Shippers of Owensboro, Kentucky, and Others for the Reduction of Freight Rates Pending Before the State Board of Railroad Commissioners.

J. ED GUENTHER, ETC., Complainants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ETC., Defendants.

Motion to Dismiss and Order.

To the Honorable Railroad Commissioners of the State of Kentucky.

GENTLEMEN: I. For some months past the shippers of Owensboro have had pending before your Honorable Body a com-
211 plaint against sundry railroad companies in the State of Kentucky.

The original complaint, as it was stated before your Commission on the 27th day of February, 1905, at the opening of the hearings in Owensboro, was in the following words:

"The shippers of Owensboro claim two things: (1) They claim that in some instances their freight rates amount to extortion pure and simple.

"In other instances they claim that they are discriminated against,

both in the shipping from and the receipt of goods into the town of Owensboro; they also claim that the law commonly and popularly known as the long and short haul law is openly, persistently and flagrantly violated by these railroads, and we will attempt to establish these propositions by evidence before you."

Much evidence was taken on the original proposition, when later an amended complaint was filed, which is now pending, making all the railroads in Kentucky parties defendants, in which it was charged in four paragraphs that local freight rates to and from all points in Kentucky were exorbitant and excessive.

As all the matters set forward in our original and amended complaint against the defendant railroad companies have been settled, and finally adjusted between complainants and the railroad companies, we now move your Honorable Body to dismiss absolutely all proceedings instituted in our name and to enter an order reciting that further proceedings against the railroads growing out of the complaints preferred by us have been finally agreed to be adjusted and settled.

II. The grounds of this motion are that the freight rates of which the complainants complained, both in their original and amended complaints, have been and are to be revised, modified and reduced in such a way as to be satisfactory to the complainants and to the Owensboro shippers.

The adjustment and compromise which has been entered into between the complainants and the railroads settles many
212 vexed problems, both with respect to local and through freight rates, and we respectfully ask that the further agitation of freight rates ought to cease, as far as this controversy is concerned.

III. The adjustment which the shippers for Owensboro have secured for themselves with the defendant railroad companies and for all others similarly situated is of material advantage to the public. The railroads have discussed, in what we think a spirit of fairness, the question of freight rates involved in our complaints, and have met us upon equitable grounds, having made many material concessions which are of vital importance to the shipping public.

Wherefore we ask that the above styled proceedings be dismissed and we hereby notify your Honorable Body that we decline, under any and every circumstance to further prosecute the proceeding, and that we will not permit it to be prosecuted in our names for any purpose whatever.

J. Ed. Guenther, one of the complainants, says the foregoing statements are true as he verily believes, and that he is authorized by his co-complainants to enter the foregoing motion and ask that the proceeding be dismissed.

J. ED. GUENTHER.

Subscribed and sworn to before me by J. Ed. Guenther this the 2d day of October, 1905.

GLEN MORGAN, *Ex. D. C., Ky.*

213 The following petition was filed in the office of the Commission Oct. 6, 1905:

Kentucky Railroad Commission.

J. E. GUENTHER, ETC.
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. COMPANY, SOUTHERN RAILWAY COMPANY IN KENTUCKY, CHESAPEAKE & OHIO RAILWAY COMPANY, LEXINGTON & EASTERN RAILWAY COMPANY, LOUISVILLE, HENDERSON & ST. LOUIS RAILROAD COMPANY, LOUISVILLE & ATLANTIC RAILROAD COMPANY, AND ALL OTHER RAILROADS THAT OPERATE THEIR LINES IN THE STATE OF KENTUCKY.

The Commonwealth of Kentucky, by Bennett H. Young and William Lindsay, employed as attorneys by the Governor of Kentucky, pursuant to and because of notice given by the Attorney General of Kentucky, on September 27, 1905, that he was so engaged in other matters that he could not give the questions herein involved his full time in their preparation and in the consideration of the many legal points at issue, which it will be necessary to consider, and in order, that the said Board shall have the necessary assistance in matters growing out of the complaints filed by J. E. Guenther, Norman Lumber Company and others, comes and states that J. E. Guenther, Louisville Veneer Mills, Norman Lumber Company, Calloway Lumber Company and others have heretofore filed complaints, and amended complaints with the Kentucky Railroad Commission, charging that all the local freight rates, from and to all points in the State of Kentucky, as fixed and charged by the defendant railroad companies, on all classes of freight, are excessive, discriminatory and extortionate, and the said Railroad Commission having re-

214 ceived information, and having reason to believe that the allegations made and information furnished by the said J. E. Guenther, Louisville Veneer Mills, Norman Lumber Company, Calloway Lumber Company and others, are true and correct, and the adjustment and determination of said question being important to all the people of the State of Kentucky, the Commonwealth, as the representative of the complainants, and of all the said people of Kentucky, pursuant to notice heretofore given on October 3, 1905, states:

I. That the local freight rates as fixed, maintained and charged by the defendants herein, are exorbitant, excessive and extortionate; that some of the rates are excessive, many of them are extortionate, and a large proportion of them discriminate in favor of some local communities as against other local communities, and that the rates charged by the defendant companies are in open violation of the law, are against public policy, are illegal and extortionate.

II. The Commonwealth of Kentucky further states that the local rates fixed, maintained and charged by defendant railroads throughout the State of Kentucky are not uniform; that they do not treat

each local community with fairness or equitably, but that the rates are arbitrarily fixed and maintained so as to build up a community, or discriminate against it, at the pleasure of defendant companies.

The Commonwealth of Kentucky makes part of this petition and amended complaint a table which has already been filed in this proceeding, and which has heretofore been denominated "Comparison of Local Rates." The Commonwealth of Kentucky makes said table a part of this petition, and asks that it be considered by this Commission as if said table were fully written out herein.

The Commonwealth of Kentucky further offers to file and make a part of this petition a table designated "Table of Comparative Rates of Local Mileage—Scale Basis," which table has already been offered in evidence in this proceeding at the hearing of the charges and allegations made in the petition and amended complaints before this Commission at Owensboro, Kentucky, and which the
215 Commonwealth of Kentucky is informed already constitutes a part of the proof in the record before this Commission. The Commonwealth of Kentucky makes said table a part of this complaint as if fully set out herein.

The Commonwealth of Kentucky further alleges that the defendant railroads have been charging, collecting and receiving extortionate freight charges over their lines in the State of Kentucky, and that such rates have been charged, collected and received, in violation of the rights of the people, and which rates, charges and collections are extortionate and discriminating.

The Commonwealth of Kentucky further alleges that the defendants herein have been making and giving undue and unreasonable preference and advantage to persons and localities, and to particular descriptions of traffic in the transportation of a like kind of traffic, and have been subjecting a large number of persons in this Commonwealth, and a large number of companies, firms and corporations in localities in particular lines of traffic to such rates as are undue, unreasonable and to the prejudice and disadvantage of such persons, companies, firms, corporations and localities.

Wherefore, The Commonwealth of Kentucky asks this Commission to take, hear and consider proof upon the questions as to the justness and reasonableness, or extortionate character, of any of the charges made herein, for the transportation of freight within the limits of the State of Kentucky, and to summon such parties as may have knowledge in regard to the particular transaction herein complained of, and to take the necessary proof to secure the facts for a full and complete examination and consideration of the freight charges made by the several defendant railroads herein to the citizens of the State of Kentucky, and, when found necessary or proper, to revise and adjust the rate or toll or compensation which shall be received by said railroads for freight received within or delivered in the State of Kentucky, and to determine whether any of the defendants have been guilty of extortion, discrimination or the collection of unreasonable charges or rates of freight, or tolls or compensation for the transportation of freight originating in or des-
216 tined to points within the State of Kentucky, and that this hearing and investigation may hereafter proceed in the name

of the Commonwealth of Kentucky, and for all general, special and equitable relief.

BENNETT H. YOUNG.
WILLIAM LINDSAY.

LEBANON, KY., *June* 18, 1900.

To the Railroad Commission of Kentucky:

The undersigned citizens of Lebanon, and Marion County, Kentucky, respectfully represent to your Board, and do hereby charge, that the rates charged by the Louisville & Nashville Railroad Company for the transportation of coal and other articles to Lebanon and the various shipping points in Marion County is extortionate. We further represent and allege that the orders heretofore entered by your body exonerating said railroad company from the provisions of the long and short haul section of the Constitution taken in connection with the rate now charged by that company works a hardship and injustice to the shippers and consumers of coal and other articles in Marion County and elsewhere along the line of the Knoxville Branch of said company. It is claimed by the representative of said railroad company that the fixing of rates by your body at Lebanon and other points in Marion County necessarily involves a readjustment of rates upon coal, etc., elsewhere upon said Knoxville Branch; if this be true, we respectfully ask that said rates be readjusted, and that your Board make and fix just and reasonable rates for the transportation of coal and all other articles upon said branch, and especially for the various points in Marion County. We ask a reconsideration of the orders heretofore entered by your body exonerating said company from the provisions of said long and short haul section, and if necessary in the readjustment and the fixing of just and reasonable rates that said orders be set aside and held for naught, all of which is respectfully submitted.

Elbert Smock.	Robert R. Thomas.	W. T. Rhodes.
B. J. Lancaster.	A. Kelly.	W. T. Mattingly.
J. A. Martin.	Finley Shuck.	W. G. Buckner.
J. P. Lyon.	J. P. Thompson, Jr.	W. C. Crawford.
Lafe S. Pence.	J. T. Smith.	R. J. Mattingly.
O. T. Mattingly.	Ben Spalding.	Thomas R. Worswack.
O. C. Kelly.	Geo. W. Abell.	Lev. Russell.

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F. H. Miles.	W. R. Spalding.	Geo. R. Kelley.
J. C. Glazebrook.	R. M. Banister.	J. B. Evans.
Prior Scirggett.	H. M. Brussell.	J. W. Rives.
W. A. Harmon.	G. J. Bosley.	Robert Abell.
L. A. Pipes.	A. Vancleave.	J. M. Cooper.
C. H. Dant.	R. A. Thompson.	Ritis J. Jarboe.
J. M. Mitchell.	W. R. Hourigan.	S. A. Russell.
J. P. Thompson.	A. Harrigan.	Theo. Brussell.
J. T. Beerelett.	C. S. Hill.	W. D. Ferrell.
Oliver Kelly, Jr.	J. H. Porter.	S. L. Todd.
S. S. Cooper.	John B. Hill.	J. G. Fisher.
William Browning.	Chas. H. Jarboe.	G. G. Averitt.
G. W. Glazebrook.	J. F. Peterson.	J. E.Edmonds.

LEBANON, KY., *June* 19, 1900.

Hon. C. C. McChord, Chairman of the Railroad Commission of Kentucky, and its Members:

DEAR SIR: To my great surprise and wonder, I see the Court of Appeals of our beloved State has annulled Sec. No. 215 of our Constitution, and by that means has left the people without hope, except through the McChord bill. Please come to our rescue, and in Heaven's name, give to our people relief against unjust oppression and exorbitant rates of the L. & N. R. R. Co. to Lebanon and the people of Marion and adjoining counties. This is not made in anger, to take any spite out against that corporation, but it is made, as a matter of substantial right, for myself and other citizens of this and other counties that are oppressed in matter of unjust rates on coal and other traffic.

Come to our rescue and let the people have some right and law in this land. The people have rights, and by the eternal God they don't propose to surrender them this side of the last ditch. Now you men act, and give us right; that is all we want, and be d—m if — want any thing less than right, and nothing but right, and hope it will come right.

LAFE S. PENCE.

218 LEBANON, KY., *Feb.* 20, 1905.

Hon. Charles C. McChord, Chairman of Kentucky Railroad Commission, Springfield, Ky.

DEAR SIR: Some time back a complaint was lodged before the State Railroad Commission of Kentucky relating to general freight rates on merchandise to Lebanon, Ky., over the Knoxville Division of the Louisville & Nashville Railroad. We realized at the time that this matter would have to be considered in connection with a general system of rates over the Knoxville Division. Now, as we understand, there are to be meetings of the Commission at Owensboro and other points in the State, for the purpose of considering rates, and we would suggest that, while the subject is before the Commission, it consider the matter of rates on the Knoxville Division of the Louisville & Nashville Railroad in order that there may be a just equalization of rates to this point. While we recognize the fact that competition from water transportation, or from other causes not brought about by railway companies, may justify, in some instances, a somewhat greater charge for the shorter distance than for the longer, we believe that it is not just, in any instance, to permit the construction of artificial highways, such as railroads, to create competition that will authorize a discrimination against a point within the State in favor of another point having no more natural advantages of position than the former. It is a fact that, on all kinds of commodities, the freight rates from Louisville to Lebanon are much greater, and in some cases about 100% greater, than the rates from Louisville over the same line through Lebanon to Junction City, 28 miles further. Likewise, the rates from Junction City to Louisville are much less and in some cases not exceeding half the amount charged from Junction City to Lebanon, but 28 miles of

the distance between Junction City and Louisville. We feel that this discrimination in favor of Junction City and against Lebanon is unjust, and that the only advantage in position or situation that Junction City has over Lebanon is the fact that the railroads have themselves created at Junction City a competition between
219 themselves, which they could as well create at any other point within the State; and they claim the right to excuse a discrimination because of the result of their own act. We do not believe that it is permissible for railroad companies to themselves create competition for the purpose of discrimination, or otherwise, and then rely upon a condition brought about by themselves to discriminate against any point, and demand an exoneration from the constitutional provision relating to the long and short haul. I have now before me a copy of the old complaint with reference to rates charged on merchandise in general from Louisville to Lebanon, and also from Junction City to Lebanon, were so large as to be unjust and extortionate; and also that the rates from Louisville to Lebanon were unjustly high in proportion to the rates for the longer distance from Louisville through Lebanon to Junction City, and the rates from Junction City to Lebanon were unduly high when compared with the rates for the longer distance haul from Junction City through Lebanon to Louisville. It was the intent, at the time, to represent to the Railroad Commission that the rates were improper, unjust and unduly burdensome for two reasons: First, that the long and short haul provision of the Constitution was plainly violated; and, second, that the rates charged were in themselves too large for the service actually performed, and that, since a change of the rates to Lebanon might necessitate changes at other points on the Knoxville Branch, it would be proper for the rates to this point be considered in connection with the general question of rates on the Knoxville Branch of the Louisville & Nashville Railroad.

Trusting that the Commission will give this matter attention at an early date, I am

Very truly yours,

H. W. RIVES.

SPRINGFIELD, KY., *August* 19, 1905.

Mr. T. B. Harrison, Jr., District Attorney, L. & N. R. R. Co., Louisville, Ky.

DEAR SIR: I do not believe I have heretofore furnished you a copy of complaint filed by H. W. Rives at Lebanon, Ken-
220 tucky, some time ago, wherein he alleges that the rates charged upon the Knoxville Division of your railroad are extortionate and discriminating. I now enclose copy of this complaint, and inasmuch as the entire subject of rates is raised by the Owensboro amended complaint, which is set for hearing at Frankfort on the 20th, the Commission will take under consideration and hear this complaint filed by Mr. Rives along with the Owensboro complaint.

Yours very truly,

C. C. McCHORD,
Chairman.

CINCINNATI, *September* 27, 1905.

Rate 719 C.

J. E. GUENTHER ET AL.
vs.
C. N. O. & T. P. ET AL.

NORMAN LUMBER COMPANY ET AL.
vs.
C. N. O. & T. P. ET AL.

Mr. Moses R. Glenn, Secretary, Railroad Commission, Frankfort, Ky.

DEAR SIR: Herewith separate reply of the C. N. O. & T. P. R'y Co. to the amendment of the complaint of J. Ed Guenther *et al. v.* C. N. O. & T. P. R'y *et al.*; also separate reply of this company to the petition as filed by the Norman Lumber Co. *et al.* in this same cause.

Yours truly,

G. P. BILES,
G. F. A.
H. A. P.

Complaint of Norman Lumber Company, etc., vs. Louisville & Nashville Railroad, Cincinnati, New Orleans & Texas Pacific Railway, and other Railroads in Kentucky.

For its separate response to the petition of the Louisville Veneer Mills, Norman Lumber Company and Calloway Lumber Company, this defendant, the C. N. O. & T. P. Ry. Company, says:

I. This defendant denies that any freight rates from and to points on the line of its railroad in the State of Kentucky are ex-
221 cessive or extortionate, and denies that the freight classifications operative between the points on its line of railroad in the State of Kentucky are discriminatory and extortionate.

II. This defendant denies that the rates and classifications on lumber, logs or timber commodities, to and from points in the State of Kentucky on the line of its railroad, are extortionate, discriminatory or unreasonable.

III. This defendant denies that the rate on railroad or cross-ties from non-competitive points on its line in Kentucky to any other point in the State of Kentucky, is fixed by this defendant so that it amounts to confiscation; this defendant denies that it prevents the producer or owner of said railroad or cross-ties from getting them to any open market, or that it compels the producer to sell such railroad or cross-ties to this defendant at whatever price it may offer.

IV. This defendant admits that the rates between points on its line in Kentucky on walnut, cherry and cedar are higher than rates on common woods, and denies that such higher rates on cherry, walnut and cedar timber, logs and lumber are unjust, unduly discriminatory or extortionate.

V. This defendant states that it fixes and maintains low rates on all logs and lumber between points on its line, and that said rates are made low to induce the movement of this class of traffic, promote enterprise and to develop the country; that the existing regulations as to standards and sidings are just and reasonable.

This defendant denies that this Honorable Commission has any jurisdiction in this proceeding to revise its rates to points in Kentucky or take cognizance of same, in as much as this defendant has no knowledge or information that complainants have made use of said rates, and therefore have no ground for complaint against this defendant by reason of said rates. Wherefore, having fully answered this, the defendant asks that the petition of the Norman Lumber Company *et al.* be dismissed as to this defendant.

G. P. BILES,
General Freight Agent,
C. N. O. & T. P. R'y.
H. A. P.

To the Honorable Railroad Commission of Kentucky.

222 *Complaint of J. Ed Guenther, etc., vs. Cincinnati, New Orleans & Texas Pacific Railway, Louisville & Nashville Railroad, Illinois Central Railway and Other Railroads in Kentucky.*

Answer of C. N. O. & T. P. Ry.

For a separate answer to this complaint, the defendant, the C. N. O. & T. P. Ry. Company, says:

That this defendant denies that complainants have the right by this proceeding to revise the rates of all the defendants.

I. Defendant denies that freight rates from and to all local points in the State of Kentucky as fixed and charged by this defendant upon all or any class of freight are excessive, discriminatory or extortionate.

II. The defendant denies that the rates as fixed, maintained and charged by this defendant between points in the State of Kentucky are exorbitant, excessive or extortionate. This defendant denies that any of such rates as charged by this defendant between points in the State of Kentucky discriminate in favor of some local communities as against other local communities, and denies that the rates charged and maintained by this defendant are in violation of the law, against public policy, illegal and extortionate.

III. This defendant says its local rates fixed, maintained and charged between points in the State of Kentucky are uniform; that it treats each local community equitably and with fairness; and denies that its rates between points on its line in the State of Kentucky are arbitrarily fixed and maintained so as to build up a community or discriminate against it at the defendant's pleasure.

IV. This defendant says that it was not a party to the original

complaint herein and has had no notice thereof or of any
223 hearing had or proof taken thereunder, and therefore denies the complainants' right to have the original complaint amended so as to make it cover local freight rates charged by this defendant or by each and every railroad operating a line of railroad in the Commonwealth of Kentucky. The defendant says that Owensboro, Ky., is not a point on the line of the railroad operated by this defendant, and that it fixes or maintains no rates, local or otherwise, into or out of Owensboro, Ky., and therefore denies the complainants' right to ask revenue or adjustment of this defendant's freight rates between points on the line of this defendant's railroad, and denies that these complainants are entitled to any relief at all, either in law or equity; no shipper or patron of this defendant having made any complaint.

V. This defendant denies that this honorable Commission has any jurisdiction in this proceeding to revise its rates from points in Kentucky or take cognizance of the same in as much as the complainants do not and have not used said rates, and have no ground for complaint against this defendant by reason of its said rates.

G. P. BILES,
General Freight Agent,
C. N. O. & T. P. R'y.

To the Honorable Railroad Commission of Kentucky.

224 *In the Matter of Shippers of Owensboro, Ky., and Others for a Reduction of Freight Rates Before the State Board of Railroad Commission.*

J. ED GUENTHER, ETC.
vs.
LOUISVILLE & NASHVILLE RAILROAD CO., ILLINOIS CENTRAL RAILROAD COMPANY, CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO., SOUTHERN RAILWAY IN KENTUCKY, CHESAPEAKE & OHIO RAILWAY COMPANY, LEXINGTON & EASTERN RAILROAD COMPANY, LOUISVILLE, HENDERSON & ST. LOUIS R. R. CO., LOUISVILLE & ATLANTIC RAILROAD COMPANY, AND ALL OTHER RAILROADS THAT OPERATE THEIR LINES IN THE STATE OF KENTUCKY.

Answer of Louisville & Atlantic Railroad Co.

1. The Louisville & Atlantic Railroad Company for answer to the first paragraph of the complaint herein, as amended, denies that the rates charged by it are either excessive, or discriminatory, or extortionate.

2. For answer to the second paragraph it denies that its local rates of freight as fixed, maintained and charged are either exorbitant, excessive or extortionate; denies that any of its rates discriminate in favor of some local communities as against other local communities; denies that its rates charged and maintained are in violation of law or against public policy, or illegal, or extortionate.

3. For answer to the third paragraph it denies that its local rates

fixed, maintained and charged are not uniform; deny that they do not treat each local community with fairness or equitably; deny that its rates are arbitrarily fixed and maintained so as to build up a community or discriminate against it at the pleasure of defendant.

4. For answer to the complaint as amended by the Norman Lumber Company and others, it denies that the rates and
225 classifications of lumber, logs, ties, and other lumber commodities are either extortionate, discriminatory or unreasonable; denies that its rate on railroad or cross-ties from non-competitive points to other points in the State of Kentucky, is fixed so that it amounts to confiscation and prevents the producer or owner of said cross-ties from getting them into an open market; denies that it compels him to sell them to defendant at whatever price it may see fit to offer; denies that its rate on either cherry, walnut, or cedar lumber, timber or logs to and from points in Kentucky, is fixed by defendant three cents per hundred pounds higher than the rate on all other classes of timber, logs and lumber; denies that it requires said petitioners to pay freight charges on standards and sidings furnished by them for loading logs on flat cars.

Wherefore, having fully answered, the Louisville & Atlantic Railroad Company prays that the complaint as to it be dismissed.

A. E. RICHARDS,
Att'y for Louisville & Atlantic R. R.

A. Waller & Co., Grain.

HENDERSON, KY., 9-29-05.

C. C. McChord, Chairman, Kentucky Railroad Com'n, Springfield, Ky.

DEAR SIR: We have been noticing, with much interest, your efforts in behalf of the citizens of Owensboro, Paducah and Henderson, to relieve them of the unjust discrimination in freight rates, to and from Eastern territory, as compared with Evansville, and that you have filed a petition against the railroads interested before the Interstate Commerce Commission.

In our opinion, there is nothing of more importance to the welfare of these cities than to have the unjust discriminations removed. We noticed in the Courier-Journal of the 28th, that a committee had been appointed by the Business Men's Association of Owensboro to confer with representatives of the different railroads
226 interested, at a meeting in Louisville. We take it for granted that you will be present to look after the interests of Henderson as well as Owensboro. We hope that you will not agree to any adjustment of these differences between the people and the railroad companies, in which the interests of Henderson are not protected.

Our milling interest has suffered severely on account of this discrimination during the last few months. The handicaps under which we are laboring are especially onerous when the price of feed is ruling low, as is the case at present.

Our neighboring city, Evansville, has grown to be a very important milling center, and at this time two large flour mills are being erected there, and the output has probably increased 25 per cent. during the last year.

There is no reason why Henderson should not prosper in the same manner, except for these discriminations which are arbitrarily assessed against us by the railroad companies.

Very sincerely, A. WALLER.

The foregoing exhibit is endorsed in words and figures as follows, viz:

Filed at Rules, Jany. 7, 1907, W. G. Chapman, Clerk.

227 EXHIBIT "B," WITH ANSWER, L. & N. R. R. Co. *v.* CHAS. C. McCHORD ET AL.

Before the Interstate Commerce Commission.

THE RAILROAD COMMISSION OF KENTUCKY

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY; LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; PENNSYLVANIA RAILROAD COMPANY; CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY; PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; ERIE RAILROAD COMPANY; NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY; BALTIMORE & OHIO RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; CHESAPEAKE & OHIO RAILWAY COMPANY; THE TRUNK LINE ASSOCIATION, and THE CENTRAL FREIGHT ASSOCIATION.

The Railroad Commission of Kentucky, by its Commissioners, A. T. Siler, McD. Ferguson and C. C. McChord, respectfully shows:

I. That the complainant, the Railroad Commission of Kentucky, is a department in the State Government of the Commonwealth of Kentucky, created and organized under and by the Constitution and laws of said Commonwealth with certain defined rights and
228 duties under said Constitution and laws, and that as such Commission it is made its duty to see that the laws relating to all railroads are faithfully executed and to exercise a general supervision over the railroads of the State; that whenever it shall come to the knowledge of said Commission or when it shall have reason to believe that the laws affecting railroad corporations in their business relations to the public have been violated, the said Commission shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violations; and when such corporations violate or are about to violate the provisions of the act to regulate commerce, it is made the duty of said Commission to present the facts to this honorable Commission and to appeal to it for relief, and this petition is filed herein pursuant to the requirements of said Constitution and laws.

II. Your complainant further represents that each and all of the defendants named in the caption herein other than the defendants,

the Trunk Line and Central Freight Associations, are railroad corporations, engaged in interstate commerce either over their own lines of railroad or through connecting carriers throughout what is known as Trunk Line and Central Freight Association territory, and including various points in the State of Kentucky. Said defendant railroad companies are common carriers engaged in the through transportation of passengers and property to and from said points, and are each and all engaged as such common carriers in interstate commerce and subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

III. Complainants further state that by and through a combination and agreement between said defendants certain aggregate rates have been established, adopted and enforced and are now being charged and collected by said defendant railroads for the transportation of commodities to and from points in said territory which, as applied to such transportation to and from certain hereinafter designated points in Southwestern Kentucky, are unjust and unreasonable generally and relatively so as to compare with rates charged by said defendants to and from other points in the States of
229 Indiana and Illinois; that by an unlawful combination and agreement upon the part of said defendant railroads and with the assistance of said Trunk Line and Central Freight Associations, said defendant railroad companies for many years past have been and are now discriminating against the shippers of Owensboro and Henderson, Kentucky, and other points in Kentucky contiguous thereto upon all traffic to and from said Trunk Line and Central Freight Association territory, in that a higher rate of freight is charged for the transportation of all commodities than that charged for a like service to and from various points in Illinois and Indiana of equal, and in many instances of greater, distances under substantially similar circumstances and conditions; that by said combination and agreement upon the part of the defendant railroad corporations, together with various other railroads in all that territory east of the Mississippi and north of the Ohio rivers, known as the Trunk Line and Central Freight Association territory, defendants herein have been organized, all of said railroads being members thereof; that said Associations have been formed for the purpose of representing said railroads in formulating and enforcing a certain percentage basis or scheme for making and prorating rates to and from all points east of said Mississippi and north of said Ohio River, including certain points in the State of Kentucky, such as Louisville, Owensboro, Henderson and Paducah.

IV. Complainants further state that said Trunk Line and Central Freight Associations are but creatures, agents and employés of said defendant railroad companies and other railroad companies, in the territory herein described, and as such agents and in combination with said railroad companies are controlling all competitive traffic throughout that large part of the United States, and in order to do so have divided the territory so covered into certain sections. In each section different classifications are used. The territory north of the Potomac and Ohio rivers and east of Chicago and the Missis-

sippi River is one section and uses what is known as the Official Classification; that south of the Ohio and Potomac rivers and east of the Mississippi River is another section and uses the Southern
230 Classification. That west of Chicago and the Mississippi River is again another section using the Western Classification, while competitive traffic to and from the Pacific Coast is still another and also uses the Western Classification, as to class rates. The defendant, the Trunk Line Association, embraces the important railroads leading from the Eastern seaboard to such points as Buffalo, Erie, Salamanca, Pittsburg, Parkersburg and Wheeling, these points being known as the Western Termini of the Trunk Lines, and the Eastern Termini of the roads in Central Freight Association territory. For many years these Associations and the roads serving this territory and having their connections from the seaboard to the West and to certain points in the South have by agreement fixed the through rates from New York to Chicago. The rates thus adopted are made the standard or basis for the construction of tariffs from other Eastern cities and points adjacent thereto, either directly or indirectly, in competition for Western and certain Southern traffic. The roads from the East publish rates and issue through bills of lading to all Western points located on the railroads within the territory west of Buffalo and Pittsburg and east of the Mississippi and north of the Ohio rivers. This is done by agreement and these agreed rates from New York to Chicago are taken as the standard and called 100 per cent. Through rates to the West and to such Southern points, south of the Ohio River, as Owensboro, Henderson and Paducah, in the State of Kentucky, are computed at a percentage of the New York-Chicago rates. Louisville, Ky., very properly takes the Chicago rate, or 100 per cent. Owensboro, Henderson and Paducah are required to pay 120 per cent., while Evansville, Ind., is given a 110 per cent. rate on South-bound traffic from the East, and 105 per cent on East-bound traffic. The basis for making standard class rates between Trunk Line Western Termini points and points taking 100 per cent. or higher of the rates between New York and Chicago are certain percentages of the rates applying from the same percentage points of origin to New York.

V. Complainants say this 120 per cent. rate applying at
231 Owensboro and Henderson, Ky., became effective many years ago, at which time there was only one railroad entering either Owensboro or Henderson from 100 per cent. territory, namely, the defendant, the Louisville & Nashville Railroad, running from Louisville, Ky., to and through said last named cities, the distance by its rails to Owensboro being 215 miles. Since such adjustment, however, the defendant, the Louisville, Henderson & St. Louis Railway Company, has constructed its line from the city of Louisville, passing through Owensboro and Henderson, Ky., thence via the line of the defendant, the Louisville & Nashville, through Evansville, Ind., thence to St. Louis, and thereby the distance from Louisville to Owensboro has been very greatly shortened, the exact distance being 113 miles. Complainants say the present adjustment of said rates was evidently made upon the idea that traffic to and from Trunk Line and Central Freight Association territory destined

to Owensboro or Henderson, Ky., was transported by way of Evansville, and that on account of the bridge toll at Henderson it was deemed just and fair to charge the shippers at Owensboro and Henderson 10 per cent. greater rate to and from Trunk Line and Central Freight Association territory than was charged Evansville shippers. Complainants say that if this condition ever existed, it no longer exists for the reason that the principal portion of the traffic to Owensboro, Henderson and Evansville passes through the city of Louisville and is there turned over to the Louisville & Nashville, Illinois Central, or the Louisville, Henderson & St. Louis, thus giving to said defendants a long haul out of the business and their agreed proportions of the rate. Complainants say that the claim upon the part of the defendant railroad companies operating south of the Ohio River that the roads north of the river make the through rate from the East and that they can not control the situation is untenable, and especially so as regards traffic to the South, inasmuch as said Southern roads control this situation both out of the cities of Evansville, Ind., Henderson and Owensboro, Ky. Complainants further say that the defendant, the Louisville, Henderson & St. Louis Railway Company, through its connections at Louisville and by reason of its close traffic arrangements with its co-defend-
232 ant, the Louisville & Nashville Railroad Company and its connections, is enabled to compete for and does transport a large portion of the traffic from and to the East to and from Evansville, Ind., passing directly through both Owensboro and Henderson, Ky., charging a less rate for the longer haul to Evansville than for a shorter haul and for a similar service rendered shippers at Owensboro and Henderson. Complainants say that upon traffic thus transported the question of bridge toll does not enter into the proposition at all so far as Owensboro and Henderson are concerned, for the reason that when freight from points north of the Ohio River destined to either Owensboro or Henderson crosses the bridge at Louisville it is still in 100 per cent. territory and has no other bridge to cross after reaching Louisville en route for Owensboro or Henderson. This is practically the same condition as exists on business destined to Evansville via lines north of the river, for the reason that after it reaches a 100 per cent. point, such as Terre Haute, Ind., the distance from Terre Haute to Evansville is practically the same as regards traffic from the East, and especially in view of the fact that what is commonly known as a Trunk Line Railroad does not enter either city. Freight destined to Evansville is transported by one of the other of the Trunk Lines to Terre Haute and there turned over to some local road like the Evansville & Terre Haute or Evansville & Indianapolis Railroad, to be transported over their rails to Evansville. Upon the other hand freight from the same territory destined to Owensboro or Henderson, Ky., is transported by one of the Trunk Lines to Louisville and there turned over to either the Illinois Central, the Louisville & Nashville, or the Louisville, Henderson & St. Louis Railway, to be transported to Owensboro and Henderson, as the case may be. Complainants say there are no competitive conditions existing at Evansville, Ind., that would or do justify a lower rate than that charged into or from

Henderson or Owensboro, Ky. As an illustration of some of the discriminations practiced by the defendants, the following rates and percentages taken from a tariff now in effect show the through rate, per cent., and proportion thereof received by the defendant, the Louisville, Henderson & St. Louis Railway in connection
233 with the Cumberland Gap Dispatch to and from the points indicated, to-wit:

From	To	Per cent.	In cents per 100 pounds.						
			Classes....	1	2	3	4	5	6
N. Y., N. Y...	Owensboro.	24	Through rate.	80.	70.	54.	38.	32.	27.
			L. H. & St. L. proportion..	17.28	14.88	11.04	7.2	5.76	4.56
"	East St. Louis.	13.6	Through rate	77.	67.	52.	37.	31.	26.
			L. H & St. L proportion..	9.11	7.75	5.71	3 67	2 86	2.18
"	Evansville .	20	Through rate.	73.	64.	49.	35.	29.	25.
			L. H. & St. L. proportion..	12.6	10.8	7.8	5.	3.8	3.
Boston, Mass..	Owensboro	24	Through rate.	85.	74.	57.	40.	34.	28.5
			L. H. & St. L proportion..	18.48	15.84	11.75	7.68	6.24	4.2
"	East St. Louis.	12.3	Through rate.	82.	71.	55.	39.	33.	27.5
			L. H. & St. L. proportion..	8.86	7.5	5.53	3.57	2.83	2.15
"	Evansville .	20	Through rate.	78.	68.	52.	37.	31.	26.5
			L. H. & St. L. proportion..	13.6	11.6	8.4	5.4	4.2	3.1
Baltimore, Md	Owensboro.	24	Through rate.	74.	64.	53.	36.	31.	25.
			L. H. & St. L. proportion..	15.84	13.44	10.8	6.72	5.52	4.08
"	East St. Louis.	14.5	Through rate.	71.	61.	51.	35.	30.	24.
			L. H. & St. L. proportion..	8.84	7.4	5.95	3.63	2.9	2.03
"	Evansville .	20	Through rate.	67.	58.	48.	33.	28.	23.
			L. H. & St. L. proportion..	11.4	9.6	7.6	4.6	3.6	2.6
Phila., Pa....	Owensboro.	24	Through rate.	76.	66.	54.	37.	32.	26.
			L. H. & St. L. proportion..	16.32	13.92	11.04	6.96	5.76	4.32
"	East St. Louis.	13.7	Through rate.	73.	63.	52.	36.	31.	25.
			L. H. & St. L proportion..	8.63	7.26	5.75	3.56	2.88	2.06
"	Evansville .	20	Through rate.	69.	60.	49.	34.	29.	24.
			L. H. & St. L. proportion..	11 8	10.	7.8	4.8	3.8	2.8

VI. Complainants aver that the defendants, and each of them, are violating the first, second, third and fourth sections of the act to regulate commerce, in that the rates so charged, collected and received to and from the territory hereinbefore indicated are unjust, unreasonable and extortionate, and are a discrimination in favor of Evansville, Ind., as against said cities of Owensboro and Hen-
234 derson, Ky., and contiguous territory, and that said rates are in themselves unjust and unreasonable, and also unjustly discriminating against said cities of Owensboro and Henderson, Ky., and give to Evansville, Ind., and territory contiguous thereto an undue and unreasonable preference and advantage; and that the rates so charged to and from Evansville, Ind., are less in the aggregate than the rates charged to and from Owensboro and Henderson, Ky., the shorter distance over the same line or lines and in the same direction, the shorter being included within the longer distance, and for the transportation of commodities of like kind under substantially similar circumstances and conditions.

Wherefore, Complainants pray that said defendants be required to answer herein and that a full investigation be made by this honorable Commission; that each of the defendants herein be required to cease and desist from said violations of the act to regulate commerce; and that all necessary orders be made and entered and proceedings had to the end that said illegal acts upon the part of defendants and their connecting carriers may be prohibited; and complainants further pray for all other necessary and proper relief in the premises.

THE RAILROAD COMMISSION
OF KENTUCKY,
By C. C. McCHORD, *Chairman.*
A. T. SILER,
McD. FERGUSON, *Com'rs.*

Dated at Frankfort, Ky., September 23, 1905.

Attest:
M. R. GLENN, *Secretary.*

Exhibit "C," with defendant's answer, will be found on pages 213 to 216 inclusive, of Exhibit "A."

235 EXHIBIT "D," WITH ANSWER, LOUISVILLE & NASHVILLE R. R. CO. v. CHAS. C. McCHORD ET AL.

Before the Railroad Commission of Kentucky.

THE NORMAN LUMBER CO., and Others, Complainants,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO. and Others, Defendants.

Opinion and Order.

While the entire question of rates upon all railroads to and from all points in the State of Kentucky is now pending before and being considered by this Commission, the question of the reasonableness of rates upon logs, lumber and cross-ties has been raised specially by the complaints of the Norman Lumber Company, the Louisville Veneer Mills and Others, in which complaint it is alleged that all rates to and from all points in the State upon these commodities are extortionate, unjust and unreasonable.

At a former hearing at Frankfort it was agreed by counsel for complainants and defendants that the following preliminary questions should be heard and determined in advance of the general hearing as to the reasonableness of all rates, viz:

First. As to the reasonableness of the rates upon cross-ties.

Second. Whether a differential shall be allowed in favor
236 of oak, poplar, and other so-called low grades of logs and lumber as against walnut, cherry and cedar logs and lumber which are denominated woods of value, and whether there should be allowed a differential in favor of lumber as against logs; and,

Third. Whether the railroads should be allowed to charge for the transportation of stakes or standards furnished by the shippers in the equipment of flat cars, for the transportation of logs and lumber.

As to the first proposition it is contended by complainant that the rates for the transportation of cross-ties should be no greater than the rate upon the common grade of lumber. As to the second question, it is contended that the rate for the transportation of walnut, cherry and cedar logs and lumber should be no higher than that upon oak, poplar and other lumber and logs. As to the third question it is contended that the shippers are required to furnish the stakes or standards for the equipment of flat cars, and that it is unjust and unreasonable to require them to pay for the transportation of such equipment; that the railroads should be required to furnish these standards, as they are a necessary part of the equipment of the cars.

The evidence so far adduced as to the rates upon lumber, logs and cross-ties, has been confined in the main to the foregoing propositions, and the Commission is now called upon to determine these three questions, reserving for future determination all other questions as to the reasonableness of rates upon lumber and logs.

The evidence discloses the fact that with some exceptions a very

much higher rate is charged for the transportation of cross-ties than is charged for the transportation of lumber, and in almost every instance the railroads discourage the movement of this commodity off of their lines. No good reason has been shown why this practice should be permitted to prevail. It was clearly shown, and it is a well-known fact, that cross-ties are less valuable than the low grades of lumber. In one instance it was proven that the rate upon ties was at least two and one-half times that of the rate upon lumber. This extraordinary rate is in effect upon the Louisville & Nashville Railroad, and has been in force for a great number of years.
237 With such a rate in effect, the movement of this commodity from points upon the line of this railroad has been prohibited, and the producer has been forced from necessity to dispose of his cross-ties to the railroad charging this rate. While a great deal of testimony has been offered, yet nowhere do we find any attempt at a justification of this rate; indeed, counsel for the Louisville & Nashville Railroad Company very frankly admitted that there was no real justification for it.

In view of the increased mileage of the railroads in Kentucky the cross-tie industry has increased very considerably in this State. There are now 3,374 miles of railroad in the State. Upon each mile of railroad there is an average of from 2,850 to 3,000 cross-ties. It will be seen, therefore, that there are, in round numbers, about 10,000,000 cross-ties in this total mileage. The life of a cross-tie is about seven years; consequently, it may be fairly assumed that the railroads in Kentucky alone consume annually in the neighborhood of 1,250,000 ties. It will be readily seen that the importance of this industry should not be underestimated.

A mere statement of these rates is sufficient argument in favor of their reduction. The Commission is of opinion that the rates upon cross-ties should be no higher than the rates upon common lumber. It will not do to say that because these ties are a necessity to the railroads they should be permitted to charge a rate for their transportation in excess of what may be deemed just and reasonable for the service performed.

This brings us to the question as to whether the railroads in the State should be permitted to charge a higher rate for the transportation of walnut, cherry, and cedar logs and lumber than is charged for the transportation of oak, poplar and other so-called inferior grades of lumber. For many years in Kentucky walnut logs and lumber brought in the market a sum largely in excess, both for the logs and lumber, of the price obtained for other logs and lumber, but it has been clearly demonstrated by the evidence on this investigation that there is no substantial difference in the value of the manufactured product of any of these timbers. It may be noted that while there formerly existed a wide divergence in the price of the low-grade logs and lumber, oak, poplar, etc., as compared
238 with the socalled woods of value, walnut, cherry and cedar, the introduction of the process of quarter-sawing oak, and the general advance in the price of lumber of the lower grades have brought these commodities much nearer together in value. The

evidence establishes the fact that while in former years the supply of walnut logs was of fair size and good quality, that timber has been cut out until the logs at present available are of small size and poor in quality; and the evidence of one witness, based on a recent test, goes to show that it now requires seventeen pounds of the raw material in walnut to make a square foot of the finished product, whereas of the oak it only requires ten pounds to make a square foot. The evidence also shows that the seasoned lumber from the walnut logs manufactured by this witness would not exceed 30 per cent. of the weight of the log, and that the weight of the lumber produced from the oak log would not exceed 40 per cent. of the log weight. It is also shown that in the manufacture of these small walnut and cherry logs there is a much greater waste than in the manufacture of other varieties of logs, on account of the difference of size, and that the percentage of the upper grades in the walnut is far below the percentage in the upper grades of oak or any other lumber manufactured. This estimate does not include cedar, for the reason that there is very little cedar lumber now manufactured. It is true that the cost of sawing walnut lumber is about one dollar per thousand in excess of the cost of sawing ordinary plain oak, but when we consider the cost of manufacturing the quarter-sawed oak along with the plain-sawed oak, it would probably be about the same average cost per thousand feet when manufactured; in other words, there is a much larger waste in sawing the smaller walnut logs than there is in sawing the oak and poplar logs.

It has been estimated that at least 35 per cent. of the tonnage south of the Ohio River is that of the products of the forests. The manufacture of these products is one of the greatest industries in the State of Kentucky, and with just and reasonable freight rates is susceptible of the highest development.

The Commission is of the opinion that there is no justifica-
239 tion for a difference in the classification or rate upon any of these different grades of logs, and the same is true as to the different grades of lumber. The Commission is of the opinion, however, that a lower rate should prevail for the transportation of logs than that charged for the transportation of lumber, and that no higher rates should be charged for the transportation of walnut, cherry and cedar lumber than that now charged, collected and received for the transportation of the so-called lower grades of lumber; that is to say, that the rate for the transportation of walnut, cherry and cedar lumber should be the same as that now charged for the transportation of oak, poplar, gum, ash and all other grades of lumber. The Commission is further of the opinion that the rates upon walnut, cherry and cedar logs should be no higher than that charged for the transportation of oak, poplar and all other low-grade logs, and that the rate for the transportation of all logs should be at least 30 per cent. lower than that charged for the transportation of the so-called lower grades of lumber.

As to the question of stakes or standards, the Commission is of the opinion that no charge should be made for transporting the same.

The Commission does not view with favor and now condemns the practice in vogue whereby the railroads depart from their published tariffs by granting rebates only to the shippers of logs who manufacture and reship over their lines—especially in view of the fact that this is not a published tariff issued for the benefit of all the shippers of the State, but is in the nature of a circular issued for the benefit of the manufacturers alone. We are of the opinion that all rates should be published, placed in the hands of all agents of the railroads for the information of the entire public and posted in their respective stations as all other tariffs are required to be posted.

It is therefore ordered, that the Louisville & Nashville Railroad Company, Illinois Central Railroad Company, Cincinnati, New Orleans & Texas Pacific Railway Company, Chesapeake & Ohio Railway Company, Lexington & Eastern Railway Company, Southern Railway Company in Kentucky, Louisville, Henderson & St. Louis Railway Company, and Louisville & Atlantic Railroad
240 Company, and each of them, shall so revise their tariffs, classifications, rules and regulations as to (1) make their rates on walnut, cherry and cedar lumber no higher than the rates now shown by their published tariffs on oak, poplar and other grades of lumber, and that their rates on walnut, cherry and cedar logs be no higher than the rates now shown by their published tariffs on oak, poplar and other grades of logs, and that said log rate be no more than 70 per cent. of their lumber rate so fixed herein; (2) make their rates on cross-ties no higher than their rates on lumber as fixed herein, and (3) make no charge for the transportation of stakes or standards used in equipping their flat cars for the transportation of logs and lumber. It is also ordered that each and all of said railroad companies shall charge, collect and receive no higher rates for the transportation of the aforesaid commodities than the rates fixed herein, and all rates in excess thereof are declared to be extortionate, unjust and unreasonable. All tariffs, classifications, rules and regulations in conflict herewith are hereby condemned. All other questions herein are reserved for future determination, and the Commission expressly reserves the power to revise, alter or amend the rates herein fixed, or to revoke, modify, or extend this order, when deemed just and proper. It is further ordered that this opinion and order shall be entered upon the record book of the Commission at its office in Frankfort, and an attested copy thereof furnished by registered mail to an officer, agent, or employé of each of the above-named railroad companies, and to said complainants.

This December 7, 1905.

C. C. McCHORD, *Chairman*,
McD. FERGUSON,
A. T. SILER,
Railroad Commissioners.

A Copy.
Attest:
C. C. McCHORD, *Chairman.*

Clerk's Endorsement: Filed at Rules January 7, 1907. W. G. Chapman, Clerk.

241 On a day following, to-wit, on the 27th day of February, A. D., 1907, an order was made and entered in said cause, which order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
CHARLES C. McCHORD ET AL.

Now upon this day came the complainant, by H. L. Stone and Thomas B. Harrison, counsel and the defendants, by Bennett H. Young and Thomas H. Paynter, counsel; and thereupon it is now ordered by the court as follows:

1. Samuel H. Stone, Esq., is hereby appointed Special Commissioner to take such evidence in this cause as may be offered by either of the parties hereto, and to make report thereon to the court; and he will take such evidence as may be offered by either of the parties hereto, and report his findings of fact thereon to the court at the earliest reasonable time practicable, together with the evidence in the cause.

2. In taking such evidence the Commissioner is authorized to employ a competent and reliable stenographer, or stenographers, whose compensation shall be fixed by him, to take down the testimony and reduce the same to writing. And said Commissioner shall have power to appoint such place or places, for the taking of the evidence as may be convenient to the parties and witnesses. Due notice whereof shall be given to counsel for complainant and defendants.

3. He shall cause such evidence to be transcribed and printed under his supervision, furnishing to the complainant and the
242 defendants copies of the same. The expense of printing shall be taxed as costs and abide the result of this action. He shall fix a time in which the complainant shall take its evidence in chief, and the time in which the defendants shall take their evidence in response, and the time in which the complainant shall take its evidence in rebuttal, but shall have power to extend the time fixed by him for the taking of evidence by either party for good cause shown.

4. After the evidence offered by the parties shall have been taken the Commissioner shall make a full report to the Court of his findings upon the facts, and shall cause the same to be printed and copies thereof delivered to counsel for complainant and defendants. He shall ascertain and find from the evidence introduced the following facts and report them to the court:

(*a*) The original cost of construction of the railroad and properties used by the complainant in the State of Kentucky in the conduct of its business as a common carrier.

(*b*) The amount expended thereon in permanent improvements.

(*c*) The amount, par, and market value of its bonds and stock as of March 1, 1907.

(*d*) The probable present cost of reconstruction and reproduction of the railroad and properties of the complainant, used in its business as a common carrier in the State of Kentucky in the condition in which they now are.

(*e*) The present value, as of March 1, 1907, of the rolling stock and equipment used by complainant in its business as a common carrier in the State of Kentucky.

243 (*f*) The total value of all the properties operated by the complainant in the State of Kentucky, and the value of all such properties devoted to the conduct of intrastate traffic, and the value thereof devoted to the conduct of interstate traffic, respectively, during the year ending June 30, 1905, and the year ending June 30, 1906, and as of March 1, 1907.

(*g*) The gross earnings, per annum, from the operation of complainant's railroads in Kentucky during the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, inclusive; showing, as nearly as practicable, what part of said earnings is from interstate commerce, and what part from intrastate commerce, stating the amounts derived from intrastate and interstate freight traffic separately from the amounts derived from other traffic.

(*h*) The operating expenses and taxes expended by complainant in Kentucky for the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906 to March 1, 1907, inclusive; showing, as nearly as practicable, what part of said operating expenses and taxes was expended in the conduct of its interstate business, and what part of same was expended in the conduct of its intrastate business.

(*i*) The earnings which would have accrued to complainant for the year ending June 30, 1905, for the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, if the rates promulgated by the defendants by their order of June 20, 1906, had been in effect during said periods.

5. Said Commissioner shall report such other facts as may be developed in the evidence which are pertinent to the issues

244 in this cause, and at the request of either party shall make a special finding upon any fact deemed material by such party to any issue herein.

6. The Clerk of this court will furnish the said Special Commissioner with a certified copy of this order and, without further order, turn over to him, taking his receipt therefor, all pleadings and court papers pertaining to this cause.

On a day following, to-wit, on the 11th day of March, A. D., 1907, an order was made and entered in said cause, which order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. CO.
vs.
CHARLES C. MCCHORD ET AL.

It is ordered that this cause be, and it is hereby, continued until the next regular September Term of the Court.

On a day following, to-wit, on the 2nd day of August, A. D., 1907, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. McCHORD ET AL.

This day came Samuel H. Stone, Special Commissioner ap-
245 pointed by the Court to take proof in the several cases, viz: Southern Railway in Kentucky *vs.* Charles C. McChord, *et al.*, Cincinnati, New Orleans & Texas Pacific Railway Co. *vs.* Charles C. McChord, *et al.*, Illinois Central Railroad Company *vs.* Charles C. McChord, *et al.*, and Louisville & Nashville Railroad Company *vs.* Charles C. McChord, *et al.*, and all parties to said actions, by counsel, appearing before the Court, and it further appearing to the Court that it is necessary that the parties hereto shall make a deposit for the purpose of paying the costs of taking and writing the proof, printing, publishing and all other expenses connected therewith.

It is hereby ordered that all the plaintiffs herein shall pay, together, to Samuel H. Stone, Commissioner, the sum of $1,000, and that the Commonwealth of Kentucky shall pay to Samuel H. Stone, Commissioner, the sum of $1,000.00 said amount to be used in defraying expenses connected with the taking and writing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the court, and all questions as to the taxation of costs are reserved for future orders of the court.

On a day following, to-wit, on the 2nd day of December, A. D., 1907, an order was made and entered in said cause, which order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. McCHORD ET AL.

246 This day came Samuel H. Stone, Special Commissioner appointed by the Court to take proof in the several cases, viz: Southern Railway Company in Kentucky *vs.* Charles C. McChord, *et al.;* Cincinnati, New Orleans & Texas Pacific Railway Company *vs.* Charles C. McChord *et al.;* Illinois Central Railroad Company *vs.* Charles C. McChord *et al.*, and Louisville & Nashville Railroad Company *vs.* Charles C. McChord *et al.*, and all parties to said actions, by counsel, appearing before the Court, and it further appearing to the court that it is necessary that the parties hereto shall make a further deposit for the purpose of paying the costs of taking and writing the proof, printing, publishing and all other expenses connected therewith,

It is hereby *ordered*, That all the plaintiffs herein shall pay, together, to Samuel H. Stone, Special Commissioner as aforesaid, the sum of One Thousand ($1,000) Dollars, and that the Commonwealth of Kentucky shall pay to said Samuel H. Stone, Commissioner, the sum of One Thousand ($1,000) Dollars, said amount to be used in defraying expenses connected with the taking and writ-

ing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the Court; and all questions as to the taxation of costs are reserved for future orders of the court.

On a day following, to-wit, on the 9th day of January, A. D., 1908, an order was made and entered in said cause, which order is in words and figures as follows, viz:

247 LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
CHARLES C. MCCHORD ET AL.

This day came the defendants, A. T. Siler and McD. Ferguson, and also came the Complainant, and it appearing from the report of Samuel H. Stone, Commissioner herein, that the defendant, C. C. McChord, had resigned his place as a member of the Railroad Commission of Kentucky, that one W. P. Walton was appointed and served as a member of the Commission until December 10, 1907, when his successor in office, Lew P. Tarlton who had been duly elected as a member of said Railroad Commission at the regular election held on November 5, 1907, duly qualified as such Commissioner; and it also appearing that the defendants, A. T. Siler and McD. Ferguson, had each been re-elected on November 5, 1907, to succeed themselves as members of said Railroad Commission; and upon these facts being suggested it was insisted that this action had abated.

And came the Complainant and moved the Court for leave to file a supplemental bill herein, bringing the said Lew P. Tarlton before the Court and asking a process against him. And the Court being advised, it is now ordered, adjudged and decreed, that the motion of the complainant to file said supplemental bill be sustained and that this action now proceed against the said A. T. Siler, McD. Ferguson and Lew P. Tarlton as members of the Railroad Commission of the State of Kentucky and against the said Railroad Commission; that process issue against the said Lew P. Tarlton; that the temporary injunction heretofore granted herein be and it is so extended as to embrace the said Lew P. Tarlton and to bind and affect him and
248 the other defendants during their new term of office as during their old term of office; subject to the same terms and conditions of the injunction heretofore granted.

Then came Llewellyn P. Tarlton in *propria persona* and entered his appearance hereto, and time is given the defendants until the March Rules 1908, to plead, demur or answer.

Supplemental Bill, referred to in the foregoing order, is in words and figures as follows, viz:

In the Circuit Court of the United States, for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. McCHORD ET AL., Defendants.

Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The Complainant, the Louisville & Nashville Railroad Company, comes and now, by way of supplemental bill to its original bill of complaint herein, respectfully shows unto the court:

That since the filing of its original bill of complaint herein, to-wit: in the latter part of November, 1907, the defendant, Charles C. McChord, resigned his office as Chairman and member of the defendant, Railroad Commission of the State of Kentucky, from
249 the Second Commission District, and the Governor of the State of Kentucky thereupon appointed for the remainder of his term one W. P. Walton, in his stead, who duly qualified by taking the oath of office required by law, and served as a member of the defendant Commission until December 10, 1907, when his successor in office, Lew P. Tarlton, who had been duly elected as a member of the defendant Commission at the regular election held on November 5, 1907, in said Second Commission District, duly qualified as such Commissioner by taking the oath of office required by law, and is now the regularly elected, qualified, and acting member of the defendant, Commission, from said Second Commission District.

The Complainant further states that the defendants, A. T. Siler and McDougal Ferguson, were at said regular election on November 5th, 1907, duly re-elected as the other two members of the defendant, Commission, the former from the Third, and the latter from the First Commission District, and thereafter on December 10, 1907, the said Siler and Ferguson duly qualified as such Commissioners by each taking the oath of office required by law, and are now the duly elected, qualified, and acting members of the defendant, Commission, from the Third and First Commission Districts, respectively, having succeeded themselves in office, and have thus been continuously in office from the institution of this suit until the present time

The complainant further states that said defendant Siler on or about December 11, 1907, was duly selected as Chairman of the defendant, Commission, and is now the duly appointed, qualified and acting Chairman of the defendant, Commission, and that said defendant Tarlton threatens to and unless enjoined will take proceedings to enforce the railroad commission's order of June 20, 1906, and July 19, 1906, hereinafter mentioned.

250 In consideration whereof, complainant prays that the said Lew P. Tarlton, individually, be substituted and made a de-

fendant herein instead of the defendant Charles C. McChord, and together with the other defendants, A. T. Siler and McDougal Ferguson, as constituting the defendant, Railroad Commission of the State of Kentucky, and that the injunction *pendente lite* heretofore granted against the defendants herein be extended to and against the defendant, Tarlton, individually and as a constituent member of the defendant Commission, and that he be required to answer the several matters and things hereinbefore set forth in complainant's original bill, and as particularly as if the same were again here repeated and the said defendant himself interrogated, but oath to the answer of said defendant is hereby expressly waived, and further that a writ of subpœna against said Lew P. Tarlton may issue commanding him, under a penalty to be fixed therein, to appear before this court on some certain day to be therein named to answer the premises, and abide by and perform such decree as may be passed herein, and that complainant may have such other and further relief, general and special, against the said defendant Tarlton, individually, and as a constituent member of the defendant Commission, as well as against his co-defendants individually, and as the other two constituent members of the defendant Commission, and against the defendant Commission, and their successors in office, as in equity complainant may on final hearing appear to be entitled to.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By WILLIAM G. DEARING,
HENRY L. STONE,
Attorneys for Complainant.

251 STATE OF KENTUCKY,
Jefferson County, set:

Personally appeared before me, G. W. B. Olmstead, a notary public, duly commissioned, qualified and acting in and for the State and County aforesaid, W. L. Mapother, who being duly sworn by me deposes and says:

That he is the First Vice President of the Complainant, Louisville & Nashville Railroad Company, and the chief officer of said Company, now in the State aforesaid; that he has read the foregoing supplemental bill and knows the contents thereof; and that the statements therein contained are true as he believes.

W. L. MAPOTHER.

Subscribed and sworn to before me by said Mapother, this January 7th, 1908.

In witness whereof, I have hereunto signed my name and affixed my official seal at Louisville, in the State aforesaid.

My Commission expires on the 29th day of January, 1910.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public of Jefferson County, Ky.

The foregoing Supplemental Bill is endorsed in words and figures as follows, viz: Filed Jan. 9, 1908, W. G. Chapman, Clerk.

On a day following, to-wit, on the 2nd day of March, A. D., 1908, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

252 LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
CHARLES C. MCCHORD ET AL.

This day came the defendants, Charles C. McChord, A. T. Siler, McDougal Ferguson and L. P. Tarlton, by their attorneys of record, and filed their joint and several plea to the bill of complaint and supplemental bill of complaint herein.

The joint and several plea of defendants to the supplemental bill of complaint, referred to in the foregoing order, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort.

In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

The joint and several plea of Charles C. McChord, A. T. Siler, McDougal Ferguson, and L. P. Tarlton, to the bill of complaint, and to the supplemental bill of complaint of the Louisville & Nashville Railroad Company, the above-named complainant.

Now come the defendants, A. T. Siler, McDougal Ferguson, C. C. McChord, and L. P. Tarlton, and for plea to the supplemental bill, filed herein at the February, A. D., 1908 rules, and for plea
253 to the original bill herein because of the hereinafter named events which have transpired since the filing of the answer herein, and say:

That in the latter part of November, A. D., 1907, the defendant, C. C. McChord, resigned his office as Railroad Commissioner of Kentucky, which resignation was duly accepted; and that he then and thereupon and has ever since ceased to hold said office or to exercise any of the duties thereof.

That on December 10th, A. D. 1907, the terms of office of the defendants, A. T. Siler and McDougal Ferguson, by the Constitutional and statutory laws under which their said offices were created and the terms thereof fixed, expires; and that their commissions of office and all their rights, privileges and duties, which they held and exercised under said commissions and as such officials and railroad commissioners holding under the elections set up in the original bills herein, then ceased and determined; that the terms of office which the last named two defendants now hold under, and the commissions which they now hold as railroad commissioners, and

under which they now exercise the functions of said office, are terms of office beginning on December 10th, A. D. 1907, and commissions for said terms awarded them by reason of the fact that at the regular Kentucky State election, held in November, A. D., 1907, they were duly elected railroad commissioners, the said Ferguson for the first district of Kentucky, and the said Siler for the third district of Kentucky, for the term of four years from and after December 10th, A. D. 1908; that they thereupon, took the oath of their office, entered upon the discharge of the duties thereof, and are now holding and exercising same by virtue of, and solely by virtue of and under the said election of November, 1907, and their commissions thereupon awarded them.

254 That the Railroad Commission of Kentucky, as composed and constituted at the time of the institution of this action, has by virtue of said resignation of said McChord, and the said expiration of the terms of office of said Siler and said Ferguson, ceased to exist; that this action was and is an action to control, restrain, direct and order, by the compulsory processes of this Honorable Court, the actions of said members of said commission, and that the relief sought by the complainant herein is against and by reason and virtue of an act or acts of the said Siler, McChord, and Ferguson as Railroad Commissioners of Kentucky, done by them on or about July 19th, A. D. 1906, and long before the said resignation of the said McChord, and the said expiration of the terms of office and official commissions of the said Siler and the said Ferguson as such railroad commissioners; that the duties, acts, laws, regulations, and facts, out of which this litigation arises, are official duties, acts, laws, regulations, and facts, and are and were incident to and resultant from, and solely incident to and resultant from acts done by, and the fact that the said three defendants constituted and were, the railroad commissioners of Kentucky on said July 19th, A. D. 1906, under terms of office and commissions which have since terminated by resignation and by law, as aforesaid.

That the defendant, L. P. Tarlton, was, by a majority of the duly qualified and voting electors, who voted at the regular 1907 election in and for the State of Kentucky, and the second Railroad Commission District thereof, at said election duly chosen as Railroad Commissioner of Kentucky for said second district; that he thereupon took the oath of his said office, entered upon the discharge of the duties thereof, and is still so acting; that said

255 office is the same office which was held by the defendant C. C. McChord at the time of the institution of this action, and up and until his aforesaid resignation; that the said Tarlton had and took no part in the acts complained of in the original bill herein nor has he ever threatened or endeavored to issue any of the rate orders, or to set on foot any of the prosecutions, or to do any of the things, or to participate in the doing thereof, complained of and sought to be enjoined herein; that neither the said Siler, nor the said Ferguson, nor the said McChord, nor the said Tarlton has ever consented, nor does either or any of them now consent that the said Tarlton may be substituted as, or made a party defendant herein.

That by virtue and by reason of the foregoing set out facts, this action has abated, and now stands abated as to each and all of the defendants herein named, and that same cannot be maintained longer against them or either or any of them.

All of which matters and things these defendants aver to be true, and they plead the said abatement to the bill and supplemental bill, and to each of them, upon which abatement and the said facts, matters and things in support thereof, they pray the judgment of this Honorable Court, and as to whether this cause may further proceed; and they pray to be dismissed hence with their costs.

BENNETT H. YOUNG,
THOS. H. PAYNTER,
CHAS. C. McCHORD,
ROBT. H. WINN.
Counsel for Defendants.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

ROBT. H. WINN.
Of Counsel for Defendants.

256 STATE OF KENTUCKY,
County of Franklin:

A. T. Siler, being duly sworn, deposes and says that he is one of the above-named defendants; that the foregoing plea is true in point of fact, and is not interposed for delay.

A. T. SILER.

Subscribed and sworn to before me this 11″ day of February, A. D., 1908. My notarial commission will expire 24″ Jany. 1910. Given under my hand and seal of office.

[SEAL.] CHAS. G. MUTZENBERG,
Notary Public, Franklin County, Kentucky.

The foregoing plea is endorsed in words and figures as follows, viz: Filed Mar. 2, 1908, W. G. Chapman, Clerk.

On a day following, to-wit, on the 9th day of March, A. D., 1908, an order was made and entered in said cause, which order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
CHAS. C. McCHORD ET AL.

This day came and now comes the Complainant, the Louisville & Nashville Ry. Co. and sets down for argument the plea in abatement of the defendants, filed herein as of February 1908 rule-day.

257 The Complainants, upon notice to defendants, having set down the plea of defendants filed at March Rules, 1908, for argument, and said plea coming on for argument and having been

argued by counsel for complainant and defendants, the same was overruled by the court, to which ruling the defendants excepted and they have ten days in which to answer.

On a day following, to-wit, on the 18th day of March, A. D., 1908, defendants filed their answer in said cause, which said answer is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

Answer to Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The defendants, Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, respectively, now and at all times saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the errors, uncertainties and imperfections in complainant's supplemental bill contained, for answer thereto, or so much thereof as they are advised it is material or necessary for them to make answer to, jointly and severally answering, say:

258 Defendants admit the resignation of Charles C. McChord, the appointment of W. P. Walton, the election of defendants Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, and that each of them was duly qualified and that said defendant Siler was selected as Chairman of the Commission, all in the manner and on the dates set forth in said supplemental bill.

Further answering, defendants adopt, reiterate and affirm each and all of the statements and allegations set forth in the original answer herein as particularly as if the same were again here repeated, reiterated and set forth in full.

Defendants deny that they or any of them, either individually or as constituting said commission, have threatened to enforce the Railroad Commission's orders or any of them complained of herein.

Wherefore, defendants pray as in their original answer and that they have such further and other relief in the premises as to this honorable court may seem meet and in accordance with equity.

R. H. WINN,
B. H. YOUNG,
T. H. PAYNTER, &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing answer is endorsed in words and figures as follows, viz: Filed Mar- 18, 1908, Chas. N. Wiard, Clerk.

259 On a day following, to-wit, on the 6th day of April, A. D., 1908, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
ADAM T. SILER ET AL.

This day came the complainant, by William G. Dearing and Henry L. Stone, its counsel, and filed its replication to the answer to the supplemental bill herein.

Replication, referred to in the foregoing order, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, McDOUGAL FERGUSON, and LEW P. TARLTON, Individually, and Constituting the Railroad Commission of the State of Kentucky, and the Railroad Commission of Kentucky, Defendants.

Replication.

The replication of the above-named complainant to the answer of the above-named defendants to the supplemental bill filed January 9, 1908.

This replicant, saving and reserving to itself all and all manner of advantage or exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of
260 said defendants to the complainant's supplemental bill herein, filed January 9, 1908, for replication thereunto, sayeth:

That it does and will ever, maintain and prove its said supplemental bill filed January 9, 1908, to be true, certain and sufficient in law to be answered unto by said defendants, and that the answer of said defendants thereto is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly as in and by its said supplemental bill filed January 9, 1908, it has already prayed.

WILLIAM G. DEARING,
General Attorney.
HENRY L. STONE,
General Counsel for Complainant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed at Rules, Apr. 6, 1908, Chas. N. Wiard, Clerk.

261 On the 10th day of July, A. D., 1908, pursuant to an order of court, Complainant filed its Amended Bill in said cause, which Amended Bill is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Amended Bill.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The Complainant, Louisville & Nashville Railroad Company, by leave of court, now amends Paragraph XX of its original bill herein by adding thereto the following additional allegations, towit:

The complainant further states that said Commission, as its order promulgated July 20, 1906, and herein complained of shows on its face, made and applied its said schedule of maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 1," to the complainant and to only three other railroad companies operating lines in Kentucky; namely, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky and the Nashville, Chattanooga & St. Louis Railway; and made and applied its said schedule of Maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 2," to the Illinois Central Railroad Company alone.

262 Complainant states that said Commission by its said order did not make or apply, nor has it by any other order, before or since, made or applied either of its said Standard Tariffs Nos. 1 and 2, or any other schedule of maximum freight rates to the following railroad companies which were then, have been ever since, and are now within the jurisdiction of the State of Kentucky, and were then, have been ever since and are now engaged in the same business in said State as the complainant—that is to say, as common carriers of intra-state freight and passengers, with the following owned and operated mileage of railroad in said State, to-wit: The Chesapeake & Ohio Railway Company, 424.87 miles; the Louisville, Henderson & St. Louis Company, 165.20 miles; the Louisville & Atlantic Railroad Company, 101.10 miles; the Lexington & Eastern Railway Company, 92.54 miles; Mobile & Ohio Railroad Company, 39.69 miles; and all other railroad companies, of which there were many, owning and operating then, ever since and now, a railway in said State, with shorter mileage, all of which companies were made defendants to the complainants in the proceeding before said Commission, which culminated in the making of said order promulgated July 20, 1906.

The Complainant states that while said Commission stated in its said order it made no mileage scale of rates or classification for the

use of the Chesapeake & Ohio Railway Company, it is true said Commission ordered that said company should not collect and receive for the transportation of commodities rates in excess of those permitted to be charged by this Complainant, as shown in said Commission's said "Standard Tariff No. 1", but said Commission then and ever since has refrained from mailing to any officer, agent or employé of the Chesapeake & Ohio Railway Company a copy of
263 its said order, or from putting or attempting to put the said order as to that company into force and effect, as prescribed in the McChord Act, or otherwise, and said order as to the Chesapeake & Ohio Railway Company has never been completed or made effective by said Commission, nor has it been observed by that Company.

The Complainant states that said Commission by its said order, arbitrarily and without authority of law, undertook to classify complainant with said three other companies and to prescribe a schedule of maximum freight rates for observance and to be observed by complainant, while neither it nor the Legislature of said state has ever prescribed any schedule whatever of maximum freight rates for or to be observed by said other above mentioned railroad companies, or either of them, then and now owning and operating their lines of railroad in said state, although they were then, have been ever since and are now engaged in the same business in which complainant was then and now engaged, to-wit: the carrying of intra-state freight on their lines within the State of Kentucky; and said Commission thus permitted said other railroad companies to operate their said lines of railroad and conduct their said business in said State, without any schedule of maximum rates having been prescribed for them, and to charge, collect and receive higher rates than those prescribed as the maximum rates for complainant on the same classes of intra-state freight and commodities, for the same distances, or such freight rates as such other railroad companies might or may deem reasonable, over their lines in Kentucky.

Complainant states that said arbitrary and unlawful classification of said railroad companies and prescribing of maximum
264 intrastate freight rates for complainant and the few other railroad companies above named, and not for all railroad companies doing the same kind of business in Kentucky, was and is a positive, direct and unfair discrimination against complainant in favor of such other companies, and amounts to a denial by the State of Kentucky and said Commission (which is one of the instrumentalities provided by said State, under its Constitution and laws, clothed with the powers of said State, and acting for and in its behalf) to complainant of the equal protection of the laws, in violation of the provisions of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, complainant prays as in its original bill and for all other relief to which it in equity may appear to be entitled.

LOUISVILLE & NASHVILLE
RAILROAD COMPANY,
By H. L. STONE, *General Counsel.*

The foregoing Amended Bill is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants filed their answer to complainant's amended bill, which said answer is in words and figures as follows, viz:

265 In the Circuit Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Answer.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The defendants, Adam T. Siler, McD. Ferguson and L. P. Tarlton, for answer to so much of complainant's amended bill as they are advised it is necessary for them to answer, say:

They admit that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 1," was made applicable to the complainant, the Louisville & Nashville Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky, and the Nashville, Chattanooga & St. Louis Railway Company, and that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 2," was made applicable to the Illinois Central Railroad Company. Defendants admit that neither of said tariffs was made applicable to the other railroads named by complainant except said Standard Tariff Number 1 was made applicable to the Chesapeake & Ohio Railway Company, and that no notice of said tariff has ever been served upon said latter company.

Defendants deny that said Commission either arbitrarily or without authority of law undertook to classify complainant with said three other companies or without such authority to prescribe a schedule of Maximum Freight rates for its observance. De-
266 fendants admit that the Legislature has never prescribed any schedule of Maximum Freight Rates for complainant or the other railroads named, nor has this Commission prescribed any such maximum schedule other than as shown by its order of July 20, 1906. Defendants admit that said other railroads are engaged in the carrying of intra-state freight on their lines within the State of Kentucky. They deny that either of said railroads is permitted to or that they do receive higher rates than those prescribed as the maximum rates for complainant on the same classes of intra-state freight or commodities for the same or any distances or that such companies are permitted to charge such freight rates as they

might or may deem reasonable over their several lines in Kentucky. Defendants say that the circumstances and conditions as regards the business of conducting transportation in the State of Kentucky by said other railroads are entirely dissimilar to that of complainants and there is no similarity with respect to the original cost of construction, the present valuation, the capitalization, the volume of business, the earnings or operating expenses, the financial condition or general conditions with respect to conducting transportation by either of said companies to that of complainant and for this reason defendants did not make said schedule of Maximum Freight Rates applicable to either of said other railroads, and for the further reason that the rates upon said other railroads except in a very few minor instances were not higher than the Schedule of Maximum Freight Rates so made by these defendants. Defendants deny that they have made any unlawful classification of said railroad companies or that they have prescribed or that they made any arbitrary or unlawful maximum intra-state freight rates for
267 complainant or either of said railroad companies doing the same kind of business in Kentucky. They deny that their said order was or is a positive or other direct, unfair, or other discrimination against complainant in favor of such other companies, and they deny that the same amounts to a denial by the State of Kentucky and said Railroad Commission to complainant of the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, or any other section, or any other provision or Section of said Constitution.

Wherefore, having fully answered defendants pray as in their original answer and for all relief to which they in equity may appear to be entitled.

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG, &
C. C. McCHORD,
Attorneys for Defendants.

The foregoing answer is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the replication of complainant to answer of defendants was filed in said cause, which is in words and figures as follows, viz:

268 In the Circuit Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

The Replication of the Above Named Complainant to the Answer of the Above Named Defendants to the Amended Bill.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants to the amended bill, for replication thereunto states that it does and will ever maintain and prove its said amended bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants to the amended bill is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly as in and by its said amended bill it has already prayed.

H. L. STONE,
General Counsel for Complainant.

269 The foregoing replication is endorsed in words and figures as follows, viz: Filed July 10", 1908, Charles N. Wiard, Clerk.

On the same date, to-wit, on the 10" day of July, A. D., 1908, a stipulation was filed in said cause, which said stipulation is in words and figures as follows, viz:

Circuit Court of the United States, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Stipulation.

It is hereby stipulated by complainant and defendants as follows: With the view of saving time and expense incident to taking proof in this case, if it shall turn out that there are grounds upon which the case can be decided without such evidence, complainant is to make a motion to instruct the Special Commissioner to report that the order of July 20, 1906, is void, basing such motion on such

grounds as may be assigned in writing, and on the face of the pleadings in this cause, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky pending the inquiry which led to the order of July 20, 1906. Defendants are to object to the said motion and urge any grounds of objection that seems to them fit, except as to the manner of raising the questions involved; which is waived; but defendants' counsel are to have reasonable notice of the time and place fixed for the hearing of such
270 motion, unless the same shall be agreed upon between counsel for complainant and defendants. The making of this motion is not to be construed as a waiver of any other ground of relief which complainant has asserted in its bill, and especially is not to be considered as a waiver of the ground asserted in the bill that the rates fixed by the order are unreasonable and confiscatory.

If the said motion is decided in favor of complainant and any decree based thereon is reversed upon appeal, such reversal is not to prejudice the right of the complainant to urge such other grounds of relief as are above stated. Pending said motion and any appeal from any order or decree based thereon, the further taking of proof before the Special Commissioner is to be suspended.

Each party is to aid the other in a speedy determination of said motion, and the speedy determination of any appeal which may be taken consequent upon the action of the Circuit Court thereon.

Nothing herein is to be deemed a waiver by the defendants of their right to make any objection they may wish to make to the jurisdiction of the court of this action.

This May 2, 1908.

WILLIAM G. DEARING,
HENRY L. STONE,
Solicitors for Complainant.
R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG, &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

271 On the same day, to-wit, on the 10" day of July, A. D., 1908, the following stipulation was filed in said cause, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. —.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Stipulation.

It is hereby further stipulated by complainants and defendants as follows:

The following copies, together with those filed as exhibits with defendants' answer herein, are true and correct copies of all complaints, pleadings, motions and demurrers filed before the Railroad Commission of Kentucky pending the inquiry which led to the order of the Railroad Commission of July 20, 1906, to-wit:

J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Demurrer.

The defendant, the Louisville & Nashville Railroad Company, demurs to the amended petition of the plaintiffs herein, because it does not state the facts sufficient to constitute a cause of action against this defendant, nor does it state facts sufficient to sup-
272 port a cause of action or complaint in behalf of the plaintiffs against this defendant.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant, Louisville & Nashville Railroad Co.

The defendant, the Louisville & Nashville Railroad Company, moves the commission to require the plaintiffs, J. E. Guenther, *et al.*, to elect which of the alleged causes of action improperly joined herein, and set forth in their amended petition, they will prosecute; and also to elect which one of the different defendants herein against which they will prosecute their complaint; and, upon their refusal so to elect, the defendant moves the Commission to strike out of said amended petition all matters and statements concerning any alleged cause or causes of action against this defendant joined with alleged

cause or causes of action against the other defendants herein. And further moves the Commission that the complaint against it and its defense thereto may be heard separately and apart from the complaint against any other defendant herein.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

273 J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

The defendant, the Louisville & Nashville Railroad Company, moves the Commission to strike from Paragraph 1 of the amended complaint herein the word "discriminatory," and to strike from Paragraph 2 all of that part of said paragraph which claims that any or all of the rates of this defendant discriminate in favor of some local communities as against other local communities, and all of that part of Paragraph 3 of said amended complaint as alleges that the local rates fixed, maintained, and charged by the defendant are not uniform and discriminate against any community, for the reason that this Commission has no jurisdiction in said matters.

T. B. HARRISON, JR.,
H. L. STONE,
Counsel for Defendant Louisville & Nashville Railroad Co.

J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

The defendant, the Louisville & Nashville Railroad Company, moves the Commission to require the plaintiffs, J. E. Guenther, *et al.*, to make more definite and specific the amended petition filed herein by said plaintiffs, and to file a bill of particulars herein; and to specify what local freight rates, and from and to what points, and on what commodities, as fixed and charged by the defendant, are
274 excessive, discriminatory and extortionate; and what rates of freight as fixed, maintained, and charged by this defendant are exorbitant, excessive, and extortionate; and what rates, if any, discriminate in favor of some local community as against other local communities, and the name of the community discriminated in favor of, as well as the community discriminated against; and what rates, and on what commodities, and between what points in this State the rates charged and maintained by the defendant are in open violation of law and against public policy, illegal and extortionate; and it

further moves the Commission to require the plaintiffs to specify wherein the local rates as fixed, maintained, and charged by this defendant in Kentucky are not uniform and do not treat all local communities with fairness or equitably, and to specify the name of each local community which is not treated with fairness or equitably, and to specify what rates are arbitrarily fixed or maintained so as to build up a community or discriminate against it, and to state the community or communities which it is alleged this defendant has built up or builds up, as well as the community or communities this defendant has discriminated or discriminates against in this State.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

275 J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

This day came the defendant, the Louisville & Nashville Railroad Company, and moved the Commission to strike from its file the intervening petition filed herein by the Norman Lumber Company, Louisville Veneer Mills, and Calloway Lumber Company, because the same was filed without authority of law, and the parties filing said intervening petition are not either necessary or proper parties complainant in this proceeding.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

The defendant, the Louisville & Nashville Railroad Company, moves the Commission to strike from Paragraph 1 and Paragraph 2 of the intervening petition of the Norman Lumber Company *et al.* all of that part of said paragraphs which refers to classifications of lumber, logs, ties and all timber commodities, for the reason that the Commission has no jurisdiction over classifications.

The defendant further moves the Commission to strike from said intervening petition Paragraph 5 thereof, for the reason that
276 said paragraph treats of matters over which this Commission has no jurisdiction.

The defendant further moves the Commission to strike from the prayer of said intervening petition the language "that all rates on

all commodities in Kentucky be reviewed and revised," for the reason that said complainants have no interest whatever in any rates on any commodities, except lumber, logs, ties and timber commodities.

T. B. HARRISON, JR.,
H. L. STONE,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

This day came the defendant Louisville & Nashville Railroad Co. and moved the Commission to strike from its files the intervening petition of the Commonwealth of Kentucky herein, because the same was filed without authority of law, and the Commonwealth of Kentucky is neither a necessary nor proper party complainant in this proceeding, concerning the rates charged or collected by this defendant for the transportation of articles of freight on its lines in the State of Kentucky.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

277 J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Co.

This day came defendant Louisville & Nashville Railroad Co. and moved the Commission for a rule against the Commonwealth of Kentucky to elect which of the alleged causes of action improperly joined herein and set forth in its intervening petition it will prosecute, and further to elect which one of the several defendants herein against which it will prosecute its complaint herein, and, upon its refusal to so elect, to strike out of its intervening petition all matters and statements concerning any alleged cause or causes of action against this defendant improperly joined with the alleged cause or causes of action against the other defendants herein.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Motion of Louisville & Nashville Railroad Co.

This day came the defendant Louisville & Nashville Railroad Co. and moved the Commission for a rule against the Commonwealth of Kentucky to show cause, if any it has, or can, why it shall not file a bill of particulars, and to make its intervening petition more definite and certain; and specify what rates and on what commodities
278 or articles of freight and between what points on the lines of this Company in this State are claimed by it to be exorbitant, excessive or extortionate; or what community or communities the rates of this defendant discriminate against, or what rates and on what commodities and between what points on the lines of this Company in this State its rates are in violation of law or against public policy, or are illegal or extortionate or are not uniform, or wherein this defendant does not treat each local community with fairness or equitably, or what rates are arbitrarily fixed or maintained so as to build up a community or discriminate against another or others, and to state the community or communities which it is alleged this defendant has built up or builds up, as well as the community or communities this defendant has discriminated or discriminates against in this State, and what rates and on what commodities and between what points on its lines in this State this defendant has been making or giving undue or unreasonable preference or advantage, and upon what descriptions of traffic in the transportation of like traffic, and what persons, companies, firms or corporations in this Commonwealth, and in what localities or lines of traffic, this defendant has subjected to undue or unreasonable rates to the alleged prejudice or disadvantage of such persons, companies, firms, corporations or localities.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Special Demurrer.

279 The defendant Louisville & Nashville Railroad Co. specially demurs to the intervening petition of the Commonwealth of Kentucky filed herein because it shows

(1) That this Commission has no jurisdiction of this defendant upon said intervening petition or of the subject of the action therein stated.

(2) That the Commonwealth of Kentucky has not legal capacity to sue or prosecute its complaint herein before this Commission.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

General Demurrer.

The defendant Louisville & Nashville Railroad Co. demurs to the intervening petition of the Commonwealth of Kentucky herein because it does not state facts sufficient to constitute a cause of action against this defendant, nor does it state facts sufficient to support a cause of action or complaint in behalf of the Commonwealth of Kentucky against this defendant.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

280 This day came the defendant Louisville & Nashville Railroad Co. and moved the Commission to strike from so much of paragraph first of the intervening petition of the Commonwealth, filed herein, as alleges that a large proportion of the rates charged by the defendants discriminates in favor of some local communities as against other local communities, for the reason that this Commission has no jurisdiction as to said alleged discrimination.

The defendant further moves the Commission to strike from the said intervening petition of the Commonwealth all that part of the second paragraph of said intervening petition in words as follows:

"The Commonwealth of Kentucky further alleges that the defendants herein have been making and giving undue and unreasonable preference and advantage to persons and localities and to particular descriptions of traffic in the transportation of a like kind of traffic, and have been subjecting a large number of persons in this Commonwealth, and a large number of companies, firms and corporations in localities in particular lines of traffic to such rates as are undue, unreasonable and to the prejudice and disadvantage of such persons, companies, firms, corporations and localities."

For the reason that this Commonwealth has no jurisdiction over the matters complained of in the language quoted.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

281 J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Answer of the Louisville & Nashville Railroad Company.

1. The defendant, the Louisville & Nashville Railroad Company, without waiving any of the questions of law or procedure raised by it in the various motions and demurrers filed by it herein, and also without waiving its right to have the notice required by the statute served upon it before any rate charged and received by it can be investigated by this Honorable Body, now comes and, for answer to the amended complaint of J. E. Guenther, *et al.*, to the intervening complaint of the Commonwealth of Kentucky, and to the intervening complaint of the Louisville Veneer Mills *et al.*, says:

It denies that all local freight rates from and to all local points in the State of Kentucky, as fixed and charged by it, on all classes of freight are excessive, discriminatory, or extortionate; and it denies that any local freight rate from and to any local point, on any class of freight whatever, as fixed and charged by it, in the State of Kentucky, is excessive, discriminatory, or extortionate; it denies that any of the rates fixed by it discriminate in favor of some local communities as against other local communities; or discriminate in favor of any local community as against any other local community, and it denies that the rates, or any rate charged by it, are in violation of the law, against public policy, illegal, or extortionate.

It denies that the local rates fixed by it do not treat each local community with fairness or equitably, and denies that said rates are arbitrarily fixed and maintained as to build up any community or discriminate against it.

282 It denies that it has been charging, collecting, or receiving extortionate freight charges over its lines in the State of Kentucky, or that it has collected and received any extortionate freight charges over its lines in the State of Kentucky, and denies that any such rate or rates have been charged, collected, or received in violation of the rights of the people, and denies that any of its rates, charges, or collections are, or have been, extortionate or discriminatory.

It denies that it has been making or giving undue or unreasonable preference or advantage to any persons or localities or to any particular descriptions of traffic in the transportation of a like kind of traffic; and denies that it has been subjecting a large number of persons, or any number of persons, in this Commonwealth, or

a large number of companies, firms, or corporation-, or any number of companies, firms, or corporations, in localities in particular lines of traffic to any rates that are undue or unreasonable or to the prejudice or disadvantage of such persons, companies, firms, corporations, or localities.

It denies that the rates of classifications on lumber, logs, ties, or any timber commodities, to and from all points in Kentucky, or to and from any points in Kentucky, on its lines are extortionate, discriminatory, or unreasonable. It denies that the rates charged and collected by it from non-competitive points, or any points, to all other points, or any point, in Kentucky, are fixed by it so that said rates amount to confiscation; and denies that the rates so fixed by it upon its lines in Kentucky prevent the producer or owner of railroad or cross ties from getting them to any open market or compel said owner to sell them to defendant, at whatever price it may see fit to offer; and denies that the rate fixed by it on
283 railroad or cross ties from any point to any point on its lines or that its practice in regard to the fixing of rates on cross ties, is extortionate, confiscatory, or unconscionable.

It admits that its rate on cherry, walnut and cedar timber, lumber and logs to and from points in Kentucky on its lines is fixed by it higher than the rate between the same points on other classes of lumber, logs, and timber; but denies that there is no sound or legal reason for said difference in the rates; and denies that the said difference in the rates is unjust, discriminatory, or extortionate. It says that cherry, walnut and cedar timber, lumber and logs are very much more valuable than the other classes of lumber generally, and for that reason, and for other good and sufficient reasons, it is quite legitimate and legal to make the rate on said classes of timber, lumber, and logs higher than the rate on ordinary timber, logs and lumber.

It denies that it is unreasonable or extortionate for the defendant to require shippers to furnish the necessary standards and sidings for the loading of logs on freight cars and not to give the shipper credit for the freight on the said standards and sidings.

2. For further answer herein the defendant says that all of its rates for the transportation of freight to and from points wholly within the State of Kentucky are entirely reasonable and just in themselves, considering all the circumstances, conditions, and the services rendered; and that all of said rates have been made, as far as possible, with a view to developing business in Kentucky and the territory served by this defendant, and have been made with a view of putting the shippers and communities in Kentucky
284 served by this defendant in as favorable a condition as possible, as well as in competition, as far as practicable, with other markets on other roads and in other States; and defendant states that this has been done, and is one of the considerable factors necessary in developing the business of the shippers and communities along this defendant's lines and in the territories served by it.

Defendant further states that its lines of road in Kentucky and elsewhere have been operated as economically and with as much skill and energy as possible, for a great many years, and that it has never

on its local or intrastate business realized a fair and just return upon the amount it has invested in its lines of road, equipment, etc., and that it has not and does not now realize a fair and just return from such business upon the amount it has invested in its lines of road, equipment, etc., in this State, and, therefore, its rates should not be reduced to any extent whatever.

T. B. HARRISON, JR.,
HENRY L. STONE,
Counsel for Defendant, Louisville & Nashville Railroad Company.

A copy.

Attest:
MOSES R. GLENN,
Sec'y the Railroad Com.

It is stipulated and agreed that each and all of the foregoing motions and demurrers of the defendant Louisville & Nashville Railroad Company in the proceedings aforesaid (complainant in this action) were overruled by said Commission, before its said answer was filed therein.

In witness whereof, we have hereunto set our signatures, this June 18, 1908.

285

WILLIAM G. DEARING,
HENRY L. STONE,
Solicitors for Complainant.
R. H. WINN,
B. H. YOUNG,
T. H. PAYNTER &
C. C. McCHORD,
Solicitors for Defendants.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10th, 1908. Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, a motion was filed in said cause, which said motion is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Motion.

This day came the complainant, and without waiving any other grounds for relief herein, or any other right to a final decree enjoining the enforcement of the order of the defendant Commission complained of, moved the Court, on the face of the pleadings, to

instruct and direct the Special Commissioner herein to report that the order of the defendant Railroad Commission, purporting to es-

ville Railroad," made June 20, 1906, and promulgated July
286 Standard Tariff No. 1, Applicable to the Louisville & Nash-
ville Railroad," made June 20, 1906, and promulgated July 20, 1906, herein complained of, is void, upon the following grounds, to-wit:

1. The statute commonly known as the McChord Act, approved March 10, 1900, undertakes to vest in said Commission, an administrative body, legislative, executive and judicial powers, in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, and is, therefore, unconstitutional and void.

2. Neither the said Statute nor any other Statute of the State of Kentucky provides for an appeal to a court from a final order of said Commission, nor for any judicial investigation or judicial review of the question of the reasonableness of any rate fixed by said Commission for services of a carrier thereafter to be rendered, before the carrier is required to put the same into force and effect, but makes such order conclusive as to the sufficiency of the rate thus fixed, and the carrier is thus deprived of its property without due process of law, and denied the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The said Act imposes such enormous fines as a result of an unsuccessful effort to test the validity of the same, or of any final order of said Commission fixing a rate for the services of a carrier to be thereafter rendered, as to render said Act, on its face, violative of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting any state from de-

privnig any person of property without due process of law, or
287 denying to any person within its jurisdiction the equal protection of the laws.

4. Said Act is unconstitutional and void because it undertakes to vest in said Commission, a non-judicial body, the judicial power of adjudging a carrier guilty of extortion for charging, collecting or receiving an existing rate, as a jurisdictional fact, to be first ascertained, before fixing a rate which such carrier may charge, collect or receive for like services thereafter rendered, without affording the carrier thus convicted an opportunity to be heard in any court on the question of its guilt or innocence of the offense of extortion, or on the question of the reasonableness or sufficiency of the rate thus fixed after such conviction for like services thereafter rendered, whereby the carrier is deprived of its property without due process of law, and denied the equal protection of the laws guaranteed by the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Said Act, without attempting to repeal the charter of the complainant, which fixes maximum rates which it may charge for its services, attempts to empower and authorize said Commission to subject complainant to criminal prosecution and heavy punishment for charging the rates authorized in its charter.

6. Said Act and order complained of undertake to impair the obligation of the existing contract between complainant and the State of Kentucky, whereby, under complainant's legislative charter and the amendments thereto, complainant is authorized and empowered to charge and collect for the transportation of goods, merchandise and property of any kind any sum on its railroads in Kentucky not exceeding the maximum rates prescribed by the provisions of its said charter and the amendments thereto, which have never
288 been repealed by the General Assembly of Kentucky, and are still in full force and effect, as set forth in paragraph 11 of its original bill, whereas the maximum rates attempted to be prescribed by the order complained of are far less than those prescribed by its said charter and the amendments thereto on the same kind of commodities and property for the same distances, in violation of that provision of Sub-Section One (1), Section Ten (10), Article One (1) of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts."

7. Neither under the title, nor the provisions contained in the body of said Act is said Commission authorized or empowered to prescribe and establish schedules of maximum rates or tariffs for the services of railroad carriers as is attempted to be done by the order promulgated July 20, 1906, herein complained of.

8. The allegations of the complaints on which the order complained of herein was made and promulgated by said Commission were insufficient to give jurisdiction to, or authorize said Commission to make said order, or to prescribe and establish the maximum rates or standard tariff for all of complainant's lines, between all stations, for all distances, on all classes of freight in the State of Kentucky even if said Act empowered said Commission to establish and prescribe such maximum rates or tariffs upon complaints of any character or under any circumstances.

9. Said Commission, without assuming to find or condemn any of complainant's rates, except those set forth in its "Table A, Local Freight Tariff," as extortionate, which was a jurisdictional fact or condition precedent, in any event, to its exercise of power (if
289 any it had at all in that respect), to make or fix rates, by its said order undertook to forbid complainant from charging, collecting, or receiving rates in excess of those embraced in any of its commodity tariffs, which were or are less, for the same distances than those shown in said Commission's "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad," whereby said Commission attempted to prohibit complainant from increasing or advancing any rate or rates it had or has in force and effect on any community or communities belonging to either of the classes set out in said so-called "Standard Tariff No. 1," notwithstanding the fact that such commodity rate or rates had not been found by said Commission to be extortionate, and the further fact that they were and are lower for the same distances than the maximum class rates which said Commission by its said order prescribed and promulgated as reasonable.

10. The said order shows on its face that the maximum rates

therein prescribed styled "Kentucky Railroad Commission's Standard Tariff No. 1" were arbitrarily made applicable to the Louisville & Nashville Railroad Co., and were not made applicable for the same distances and on the same classes of freight to all the other railroad companies operating lines in Kentucky, and although, without statutory power or authority to classify the said railroad companies in Kentucky on any basis whatever, for the purpose of prescribing freight rates to be charged and collected by them, the said Commission by said order undertook to prescribe such maximum freight rates to be observed by the complainant company, while other railroad companies operating lines in Kentucky were and are permitted to charge and collect higher rates on the same classes of freight for the same distances, or such freight rates as such other com-
290 panies may deem reasonable, although said other companies were made defendants to and proceeded against under the same complaints before said Commission in the proceedings which culminated in the making of said order promulgated July 20, 1906, and thus the attempted classification by said Commission in this respect was not based upon the character or value of the services rendered, and said order, therefore, is unfair, discriminating, and amounts to a denial to complainant of the equal protection of the laws in violation of Section One of the Fourteenth Amendment to the Constitution of the United States. This June 18, 1908.

WILLIAM G. DEARING,
General Attorney.
HENRY L. STONE,
General Counsel for Complainant.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, a motion was filed in said cause, which motion is in words and figures as follows, viz:

The United States Circuit for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

This day came the defendants and objected to complainant's written motion and grounds thereof, and moved the court, on the
291 face of the pleadings, to enter an order dismissing this action, because.

First. This Court has no jurisdiction of the alleged cause of action set out in complainant's bill;

Second. The bill does not show any equity; and the averments of defendant's answer with respect to questions raised by said motion must be taken as admitted.

Third. None of the grounds stated in said motion is sufficient to entitle complainant to the relief sought.

R. H. WINN,
B. H. YOUNG,
T. H. PAYNTER &
C. C. McCHORD,
Attorneys for Defendants.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10" day of July, A. D., the court's opinion was filed in said cause, which said opinion is in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,

vs.

A. T. SILER, McD. FERGUSON & L. P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

This cause has been submitted on motion for a final decree as prayed in the bill, pursuant to stipulation of the parties.

292 In the case of Louisville & Nashville R. R. Co. *vs.* McChord, 103 Fed. 216, Judge Evans after full argument and careful consideration, held what is known as the McChord Act involved herein to be unconstitutional and enjoined the Railroad Commissioners from taking action thereunder. On appeal to the Supreme Court this decree was reversed.

McChord, *et al.*, *vs.* L. & N. R. R. Co., 183 U. S. 483.

It was not reversed, however, on the ground that he had erred in holding said act unconstitutional, but on the ground that the action enjoined was legislation and a court had no authority to enjoin anticipated legislation. The question of constitutionality was waived and the only reference to it in the opinion was that it was a matter of "grave importance."

In the recent case of *In re* Young that went up from Minnesota, Mr. Justice Peckham cited Judge Evans' decision as an authority in support of the position there taken.

At the time of Judge Evans' decision this state had not been divided into two judicial districts. The decision was that of the United States Circuit Court for the District of Kentucky. This court has succeeded that court as to the Eastern District of Kentucky. In view of this, I do not think that I should consider the question on its merits. Comity requires that I should follow this holding of Judge Evans, backed up as it is, to a certain extent, by said reference to it by the Supreme Court. I, therefore, in accordance with said decision, hold said act unconstitutional.

In addition I think it is to the interest of the parties to get this case to the Supreme Court as soon as possible where a decision
293 can be had that is final as to the constitutionality of the act.

Until today I had not read the decision of the Supreme Court in the McChord case, all previous steps in this case, since the granting of the temporary restraining order, having been taken by consent of parties hereto; and I was under the impression that in that case the Supreme Court had overruled Judge Evans' holding that said act was unconstitutional. Otherwise, possibly, I might have indicated this position to the parties earlier in this cause.

Question is made as to the jurisdiction of this court of this case on the ground that there is no diversity of citizenship. Under the decision in the case of Raymond *v.* Chicago Traction Co. 207 U. S. 20, it would seem that this court has jurisdiction because of the federal question raised in the claim that the action of the Railroad Commissioners was in violation of the 14th amendment. If not, it has it because of the claim that said act itself is a violation thereof.

The motion is sustained and decree will be prepared accordingly.

Similar motions in the three other cases heard at same time are sustained and decrees in those cases will be prepared also.

July 10th, 1908.

A. M. J. COCHRAN, *Judge.*

The foregoing opinion is endorsed in words and figures as follows, viz: Filed July 10th, 1908. Charles N. Wiard, Clerk.

294 On the same day, to-wit, on the 10th day of July, A. D., 1908, the final decree was entered in said cause, which decree is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Final Decree.

This day came the complainant and tendered and offered to file its amended bill, which is ordered to be filed; to which amended bill defendants filed their answer, and to which answer complainant filed its general replication.

Thereupon came the counsel for complainant and counsel for defendants and tendered and offered to file their stipulation, dated May 2, 1908, and their stipulation dated June 18, 1908, which are ordered to be filed.

The counsel for complainant thereupon, in pursuance of said stipulations, entered their motion in complainant's behalf, dated June 18, 1908, and moved the Court on the face of the pleadings, together with copies of the pleadings which were filed before the Railroad Com-

mission of Kentucky, pending the inquiry which led to the order of July 20, 1906, and upon the written grounds set forth in said motion, to instruct the Special Commissioner herein to report that the order of the Railroad Commission of Kentucky, purporting to establish what is styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," Applicable to the Complainant, made June 20, 1906, and promulgated July 20, 1906, herein com-
295 plained of is void.

Thereupon counsel for defendants filed their objections to complainant's said motion, and entered their motion in behalf of defendants, on the face of the pleadings and the written grounds set forth in their said motion, that the court enter an order dismissing this action.

And said motions having by agreement of counsel been set for hearing on this day, the same were fully argued by counsel for complainant and defendants, and the court being fully advised thereupon ordered, adjudged and decreed as follows:

1. That the said objections and motion of the defendants be and the same are overruled, and the said motion of the complainant be and the same is sustained, the court being of opinion that the act of the General Assembly of the Commonwealth of Kentucky, known as the McChord Act, approved March 10, 1900, and the order of the Railroad Commission of Kentucky, promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory (upon which no decision is or can now be made), violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibit any state from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, and that said order of said Commission, so far as it is made applicable to complainant, is, therefore, null and void, and the Special Commissioner is directed so to report herein.

2. Thereupon counsel for complainant and defendants stipulated and agreed that the said report of the Commissioner shall be
296 and it is now treated and considered as filed in the terms above prescribed. And thereupon this cause was submitted for a final decree, and the court being further advised, ordered, adjudged and decreed that the preliminary injunction heretofore granted herein be and the same is made perpetual, and the defendants, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, their successors in office, and said Commission, be and they are hereby perpetually enjoined and restrained from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, herein complained of, or putting the same into force or effect, and from enforcing or attempting to enforce the same, so far as it is made applicable to complainant, or so far as it relates to the lines of railroad owned or operated by complainant in the State of Kentucky, and from recommending or procuring indictments against complainant or any of its officers, agents or employés, to recover any fine or penalty for any violation of said order or for charging, col-

lecting or receiving any rate or rates in excess of those prescribed by said order; and said defendants are further enjoined to revoke and cancel said order so far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," applicable to the Louisville and Nashville Railroad Company.

3. It is further ordered, adjudged and decreed by the court that the question of costs is not now determined but either party may, after the final determination of this cause in the Supreme Court of the United States, move for an order in regard thereto at the foot of the decree.

4. And then came defendants and in open court prayed and were allowed an appeal from this decree to the Supreme Court of
297 the United States.

Defendants shall execute a bond in the penalty of five hundred dollars, without surety, conditioned to prosecute said appeal, and file herein their assignment of errors—all within sixty days from the entry of this decree. No citation need be issued, the appeal being granted in open court and complainant being present.

The Assignment of Errors, referred to in the foregoing decree, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Assignment of Errors.

The above named defendants, Adam T. Siler, McD. Ferguson, and L. P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, conceiving themselves aggrieved by the judgment entered herein on the 10th day of July, 1908, in the above-entitled cause, pray the court that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the Supreme Court of the United States. Defendants say that in the record and proceedings in said above-entitled cause there is manifest error in this, to-wit:

1. The Circuit Court of the United States for the Eastern
298 District of Kentucky erred in holding and deciding that said court was bound by and should follow the decision of the United States Circuit Court for the District of Kentucky in the case of Louisville & Nashville Railroad Company *vs.* McChord, *et al.*, as reported in 103 Federal 216, and in its interpretation of the opinion in McChord, *et al.*, *vs.* Louisville & Nashville Railroad Company reported in 183 U. S. 483, reversing said former decree.

2. That said court erred in holding that it had jurisdiction of these defendants upon the subject-matter set forth in the bill of

complaint when the allegations of said bill are that these defendants had not been vested with the power by either the Constitution of the State of Kentucky or by any Act of its Legislature or by any law to make and enter the order of July 20, 1906, herein complained of.

3. That said court erred in rendering judgment against these defendants upon the pleadings in said cause; said judgment is contrary to law and the facts as presented by said pleadings.

4. That said court erred in holding that the Act of the General Assembly of the Commonwealth of Kentucky, Approved March 10, 1900, and the order of the Railroad Commission of Kentucky promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory, violate the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which prohibit any State from depriving any person of property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws and in holding that said order of said Commission, as far as it is made applicable to complainant is either null or void and in directing that the Special Commissioner so report.

299 5. That said Court erred in rendering a perpetual order of injunction against these defendants and their successors in office and said Commission, enjoining and restraining them from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, and from putting the same into force or effect, and from enforcing or attempting to enforce the same as far as it is made applicable to complainant or as relates to the lines of railroad owned or operated by complainant in the State of Kentucky.

6. That the said court erred in adjudging that these defendants be further enjoined to revoke and cancel said order as far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," applicable to complainant and its said lines of railroad in Kentucky.

7. That said Court erred in overruling defendants' objections to complainant's motion and grounds upon which motion and grounds the decree herein was rendered; and in overruling defendants' motion that on the face of the pleadings an order be entered dismissing this action; and said court further erred in sustaining complainant's said motion and grounds of motion, as follows:

(*a*) That said Act of March 10, 1900, undertakes to vest in said Commission Legislative, Executive, and Judicial powers in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky and that said Act is, therefore, unconstitutional, null and void;

(*b*) That because said Act does not provide for an appeal to a court from the final order of said Commission nor for any judicial investigation, or judicial review of the question of the reasonableness of any rate fixed by said Commission for services there-

300 after to be rendered before it is required to put same into force and effect, such order deprives the carrier of its property

without due process of law and denies to it the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

(*c*) That the penalties imposed by said Act are so enormous as to render the Act on its face violative of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from depriving any person of property without due process of law or denying to any person within its jurisdiction the equal protection of the laws; and

(*d*) That said Act is unconstitutional and void because it undertakes to vest in said Commission the judicial power of adjudging a carrier guilty of extortion before fixing a rate which the carrier may charge and without affording an opportunity to be heard in any court and thereby deprives the carrier of its property without due process of law and denies to it the equal protection of the laws guaranteed by the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States; and

(*e*) That said Act undertakes to impair the obligation of an existing contract between complainant and the State of Kentucky in violation of Sub-Section One, Section Ten, Article One of the Constitution of the United States; and

(*f*) That said Commission was not authorized or empowered to prescribe and establish schedules of maximum rates; and

(*g*) That the allegations of the complaints on which the order complained of was made were insufficient to give the Commission jurisdiction or to authorize it to make said order; and

301 (*h*) That said Commission had no power to forbid complainant from charging or receiving rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances than those shown in said Commission's Standard Tariff No. 1; and

(*i*) That said Kentucky Railroad Commission's Standard Tariff No. 1 was arbitrarily made applicable to complainant and was not made applicable for the same distances and on the same classes of freight to all other railroad companies operating lines in Kentucky and on that account that said order is unfair, discriminating and amounts to a denial to complainants of the equal protection of the laws in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, said Adam T. Siler, McD. Ferguson and L. P. Tarlton pray that the decree and order of the said Circuit Court of the United States for the Eastern District of Kentucky appealed from herein be reversed.

JAS. BREATHITT,
Att'y Gen'l,

R. H. WINN &
C. C. McCHORD,
Counsel for Defendants.

The foregoing Assignment of errors is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants executed an appeal bond in said cause, which said bond is in words and figures as follows, viz:

302 Know all men by these presents, That We, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, as principal-, and —— ——, as sureties, are held and firmly bound unto the Louisville & Nashville Railroad Company in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Louisville & Nashville Railroad Company, its certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of July, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court for the 10th day of July, in a suit depending in said Court, between the Louisville & Nashville Railroad Company, complainant, and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, defendants, a decree was rendered against the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, and the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, shall prosecute their appeal to effect, and [illegible]ver all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

303 A. T. SILER, *Commissioner.*
McD. FERGUSON, *Commissioner.*
L. P. TARLTON, *Com'r.*

Sealed and delivered in presence of

EMILY H. COLEMAN.
CHAS. N. WIARD.

Approved by

A. M. J. COCHRAN,
U. S. District Judge.

The foregoing bond is endorsed in words and figures as follows, viz: Filed Jul- 10, 1908, Charles N. Wiard, Clerk.

304 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

I, Charles N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing Three Hundred and Three (303) pages contain a true and complete copy of all the papers filed and proceedings had and entered in the cause, lately pending in the said court wherein the Louisville & Nashville Railroad Company was Complainant and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, were defendants, as the same will appear from the records and files of my said Office; that I have compared the same with the originals, and it is a true and complete transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand as Clerk of the aforesaid Court, and affixed the seal thereof, at Frankfort, in said District, this the 11th day of August, A. D., 1908, and of the Independence of the United States the 133rd year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court, Eastern District of Kentucky, at Frankfort.

Endorsed on cover: File No. 21,317. E. Kentucky C. C. U. S. Term No. 521. Adam T. Siler, McDougal Ferguson, and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, appellants, *vs.* Louisville & Nashville Railroad Company. Filed August 27, 1908. File No. 21,317.

(21,318.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 522.

ADAM T. SILER, McDOUGAL FERGUSON, AND LEW P. TARLTON, CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, APPELLANTS,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Record of the Proceedings of the Circuit Court of the United States for the Eastern District of Kentucky, in the Cause and Matter Hereinafter Stated, the Same Being Disposed of at a Regular Term of said Court, Begun and Held in the City of Frankfort, on the Second Monday in March, A. D. 1908, Being the 9th Day of Said Month, and the Final Decree in said Cause Being Entered on the 10th Day of July, A. D. 1908.

Present: The Honorable A. M. J. Cochran, United States District Judge.

In Equity. No. 543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, MCDOUGAL FERGUSON, and LEW P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

2 Said Action was commenced on the 25th day of July, A. D. 1906, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

On the 25th day of July, A. D. 1906, Complainant filed its Bill of Complaint in said cause, which said Bill is in words and figures as follows, viz:

3 *The Bill of Complaint of the Illinois Central Railroad Company, Exhibited against Charles C. McChord, Adam T. Siler and McDougal Ferguson, Commissioners Composing the Railroad Commission of the State of Kentucky, in the United States Circuit Court for the Sixth Circuit and the Eastern District of Kentucky.*

Humbly complaining, complainant showeth unto your honors that it is a corporation duly created by and organized pursuant to the laws of the State of Illinois and not of the State of Kentucky, with its principal office in the State of Illinois, and a citizen of the said State of Illinois and not of the State of Kentucky, and that the defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, are and at all the times hereinafter mentioned were each and all citizens and inhabitants of the State of Kentucky and members composing the Railroad Commission of the State of Kentucky, and that the office of the said Commission is and at all times

has been, as prescribed by law, in the city of Frankfort in said State of Kentucky, the capital of said State of Kentucky.

Complainant further showeth unto your honors:

1. That complainant, by its charter is and at all times hereinafter mentioned was empowered to operate railroads in the State of Illinois and other States of the United States as a common carrier of freight and passengers for hire, and has since the — day
4 of ——, 1882, *operated a railroad in the State of* Kentucky from East Cairo in said State to Fulton in said State, constituting a link in a through line of railroad extending from the city of Chicago in the State of Illinois and from many points north of the Ohio River across said river to the city of New Orleans in the State of Louisiana and to many other points in said State and other States south of the Ohio River, and operated many other railroads making physical connection with the railroad aforesaid and constituting one system of railroads aggregating over forty-three hundred and seventy (4370) miles of railroad, and extending into divers States of the United States, including the States of Illinois, Wisconsin, Minnesota, Iowa, South Dakota, Nebraska, Missouri, Indiana, Kentucky, Tennessee, Mississippi, Louisiana and Alabama, and has continuously since the 15th day of September, 1897, operated in the State of Kentucky in addition to the aforesaid line extending from East Cairo to Fulton, certain railroads, to wit:

A railroad extending from Fulton, Kentucky, a city upon the State line dividing the States of Kentucky and Tennessee and situated partly in each of said States, to and into the city of Louisville in the State of Kentucky; and a line of railroad extending from Horse Branch, a station on the railroad last aforesaid, to and into the city of Owensboro in the State of Kentucky; a railroad extending from Hopkinsville to Henderson, both in the State of Kentucky, crossing at Princeton in Kentucky; the line of railroad extending from Fulton to and into Louisville aforesaid; a railroad extending from Cecilia on the line extending from Fulton to Louisville aforesaid, through Elizabethtown to Hodgenville in Kentucky; a
5 line extending from Paducah, a city on the line extending from Fulton to Louisville aforesaid, to East Cairo aforesaid; and other railroads, except that the last two lines have been operated a shorter time. That all the railroads in Kentucky have physical connection with each other, and that the railroad aforesaid extending from Fulton to Louisville has at Fulton direct physical connection with complainant's railroad extending from Fulton to Memphis, to New Orleans, and elsewhere in the States of Tennessee, Mississippi, Louisiana and Alabama, and with complainant's other railroad extending from Fulton to Jackson in the State of Tennessee aforesaid and to divers points in the States of Louisiana, Tennessee, Mississippi and Alabama; that the aforesaid railroads extending to East Cairo aforesaid have direct physical connection with complainant's railroads in the State of Illinois and thence with the railroads in other States north of the Ohio River; that at Paducah complainant's railroads aforesaid make connection *via* a transfer boat with

complainant's railroads in the State of Illinois and thence with its railroads in other States; that the railroad aforesaid extending from Hopkinsville to Henderson has direct physical connection at Henderson with complainant's railroad extending thence to Evansville in the State of Indiana and from Evansville to other points in the State of Indiana and other States; and that complainant transacts, and for many years last past has transacted, over its system of railroads including all the railroads aforesaid in Kentucky as a common carrier of freight and passengers the transportation of *domestic*, or intrastate, and interstate business, and within said State of Kentucky transports and has since it began operation of said railroads in said State transported both domestic, or intrastate, and interstate commerce.

6 2. That in the acquisition of the right of way necessary for construction, and in the construction and equipment of the railroads aforesaid, a large amount of money was necessarily and properly expended, and that the said railroads and terminals situate wholly within the State of Kentucky and used by complainant in the transaction of purely domestic or intrastate business in Kentucky, and the equipment of said railroads used also in said intrastate business are of the reasonable and fair value of twenty-six million ($26,000,000.00) dollars at least. That complainant's system of railroads are and have always been skilfully and economically managed and that complainant has been unable to conduct its traffic, interstate and intrastate, at less than 71.03 per cent. of the gross receipts from such traffic inclusively of taxes assessed against said property, and that there is no reason to anticipate that such traffic can be handled at less or that such taxes will amount to less than as heretofore as aforesaid. That the additional cost of conducting intrastate traffic in Kentucky over the cost of all traffic conducted in said State, both interstate and intrastate, is not less than thirty per cent. of the gross receipts from intrastate traffic and that the amount of intrastate traffic has for at least one year last past been only 23.46 per cent. of the entire traffic in Kentucky, so that complainant is unable, and has always since it began operation of its railroads aforesaid in Kentucky been unable, to earn a fair and just return upon its capital invested in railroad tracks, terminals and equipment engaged in such intrastate traffic, although it has charged for the handling of such traffic no more than a fair, just and reasonable rate of tolls and charges. That, nevertheless, the Railroad Commission

7 of Kentucky, a department or instrumentality of the State government, on the 20th day of June, A. D. 1906, delivered an opinion, and then declared that it would on the 19th day of July, A. D. 1906, enter an order and on that day give to complainant official notice thereof, and on said 19th day of July, 1906, said Commission, as complainant is advised, did enter an order, and did mail to complainant's attorneys a copy thereof and of said opinion which are filed herewith as part of this bill marked "Exhibit X," which order is in words and figures as follows, to wit:

"The Commission is further of the opinion that the maximum mileage scale of rates published in the Illinois Central Railroad Com-

pany's Local Freight Tariff No. A-1045, effective December 2, 1905, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, K, L, M, N and O, are extortionate, unjust and unreasonable in so far as same are in excess of the rates hereinafter fixed in table designated 'Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 2, applicable to the Illinois Central Railroad Company.' It is, therefore, ordered that said defendant, the Illinois Central Railroad Company, be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky rates in excess of the rates shown in the following table for the classes and distances therein stated, to wit:

(Here follows the schedule of rates promulgated by the Commission and specified on page 22 of said Exhibit X.)

"Provided, however, That where said defendant, the Illinois Central Railroad Company, has in effect a tariff, or tariffs, of
8 rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated 'Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 2, applicable to the Illinois Central Railroad Company,' said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs."

Complainant avers that the Railroad Commission aforesaid was created by Section 209 of the Constitution of the State of Kentucky and that by an act approved on the 10th day of March, 1900, the legislature of said State prescribed the duties of the Commission regarding the establishment of rates for common carriers by railroad, said act being generally known as the "McChord Law," and entitled,

"An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions."

Said act provides as follows:

"SEC. 1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe
9 that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission deter-

mine that the company or corporation is, or has been, guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction in any sum not less than two thousand dollars nor more than five thousand dollars.

"SEC. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employé shall have jurisdiction in all prosecutions against said officer, agent or employé.

"SEC. 3. Prosecutions under this act shall be by indictment.

"SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed."

3. Complainant avers that its rates of toll and charges have always been reasonable, fair and just to the public and persons patronizing complainant and that no complaints of the amounts of its charges upon intrastate traffic have ever been made to complainant or to the Railroad Commissioner except in a few sporadic cases, and that in such cases complainant has voluntarily made such modification of such rates as was just, almost invariably to the satisfaction of the complaining shipper. That in 1905 J. Ed Guenther and others complained to the Commission aforesaid of certain rates made by the railroad companies entering Owensboro, to wit, Louisville & Nashville Railroad Company, Louisville, Henderson & St. Louis Railway Company and complainant, but made no specific complaint of any other rates. That on August 26, 1900, said complainants amended their complaint and complained of the rates of nearly all, if not all, of the railroad companies transacting business in Kentucky, among other things alleging "that all local freight rates from and to all local points in the State of Kentucky, as fixed and charged by the defendant railroads, on all classes

of freight, are excessive, discriminatory and extortionate." Also alleged "that the local rates of freight as fixed, maintained and charged by the defendants herein are exorbitant, excessive and extortionate. They say that some of said rates are excessive; that some of them are extortionate and all of them discriminate in favor of some local communities as against other local communities, and that the rates charged and maintained by defendant companies are in open violation of law, against public policy, illegal and extortionate." Also, "that the local rates fixed, maintained and charged by defendant railroads throughout the State of Kentucky, are not uniform; that they do not treat each local community with fairness or equitably; but the rates are arbitrarily fixed and maintained so as to build up a community or discriminate against it at the pleasure of defendant companies."

They prayed the Commission "not only to revise the local rates in and out of the city of Owensboro, but to revise and adjust the rates between all local points, from and to every local point throughout the entire State of Kentucky," and for further relief.

Complainant avers that no specific complaint was made of any rate charged by any railroad in the State of Kentucky except concerning the rates to and from Owensboro, and no explanation was made by the complaining shippers of any interest which they or any of them had in any other rates and no facts were stated
12 showing any rate charged by any railroad in Kentucky to be extortionate, unjust or unfair to shippers.

Complainant avers that on September 14, 1905, the Norman Lumber Company and other dealers in lumber tendered an intervening petition specifying their business and alleging "that all local freight rates from and to all points in the State of Kentucky on all commodities, as fixed and charged by the defendant railways, are excessive and extortionate and that the freight classifications are discriminatory and extortionate. Petitioners aver and charge that the rates and classifications on lumber, logs, ties and all timber commodities to and from all points in Kentucky are especially extortionate, discriminatory and unreasonable."

On October 14, 1905, the Commonwealth of Kentucky undertook to file an intervening petition which made no complaint of any specific rate, but complained of all local rates upon all railroads in the State.

Complainant before answering the complaints moved the Commission,

(*a*) To require Guenther and others to elect between improperly joined causes of action and improperly joined defendants, and that the complaint against complainant and the other defendants be heard separately; (*b*) that all of the amended complaint concerning alleged discrimination in rates between different communities be stricken out for lack of jurisdiction in the Commission to consider it; (*c*) that Guenther and others be required to make their amended complaint more specific, specifying what local rates, and from and to what points, and on what commodities as charged by complainant

were discriminatory or extortionate, and what rates discrimi-
13 nated between communities and commodities; (*d*) that the petitions of the lumber companies be stricken from the file as unauthorized by law; (*e*) that the part of the intervening petitions of the lumber companies referring to classifications of logs, lumber, cross ties and timber commodities be stricken for want of jurisdiction in the Commission over classifications, and that so much of the petitions as prayed the review and revision of rates on all commodities in Kentucky be stricken as the lumber companies had no interest in any rates other than those on logs, lumber, cross ties and timber commodities; (*f*) that the Commonwealth's petition be stricken because filed without warrant of law, and the Commonwealth had not the capacity to sue; (*g*) that the Commonwealth, having been permitted to sue, be required to elect between improperly joined causes of action and improperly joined defendants, and to make more specific its complaint showing what rates and on what commodities, and between what points and communities extortion and discrimination were supposed to exist; (*h*) demurrer to the Commonwealth's petition for want of jurisdiction of complainant, or the subject of the action, and for want of legal capacity in the Commonwealth to sue; (*i*) a general demurrer to the Commonwealth's complaint for want of a cause of action, and made divers other points and objections to the proceedings against complainant, all of which were by the Commission overruled, and complainant required to answer and did answer, traversing the allegations of all the petitions.

That after the rulings aforesaid the Commission propounded to complainant and all the other defendants divers questions which were answered as fully as information obtainable permitted,
14 and complainant and said other defendants produced for examination by the Commission all their officers and agents as required by the Commission, and although it appeared by the uncontradicted evidence elicited from such sources that complainant was receiving a return upon its capital invested in its railroad, terminals and equipment used for purely intrastate or domestic traffic in Kentucky less than a fair and just return or income, the said Commission nevertheless delivered the opinion and entered the order aforesaid.

4. Complainant avers that no specific rate or rates of complainant were investigated by the Commission and that the opinion delivered, as appears therefrom, is confined almost exclusively to the Louisville & Nashville Railroad Company and its condition, and that the tariff of rates promulgated by the Commission in the order aforesaid was based upon a revision of the rates theretofore charged by the Louisville & Nashville Railroad Company and without any investigation of, consideration of, or regard to the special circumstances and conditions affecting complainant, and that the tariff promulgated in the order aforesaid of rates to be charged by complainant forbids complainant to charge in any instance a higher rate than the rate to be charged by the Louisville & Nashville Railroad Company for similar distances.

Complainant avers that in the opinion and order aforesaid the Commission declared that:

"It appearing to the Commission from tariffs now on file in this office that many of the commodities assigned to the various classes stated in the Maximum Rates, Kentucky Railroad Commission's Standard Tariffs Nos. 1 and 2, herein adopted, are transported by the respective railroads on commodity rates, or rates less than those fixed by said standard tariffs, it is now Ordered, That said commodity or such other rates as are lower than those fixed by said Railroad Commission's Standard Tariffs Numbers 1 and 2, shall remain in effect as MAXIMUM RATES until otherwise ordered by this board."

That complainant has and during the entire time of its operation of railroads in Kentucky has had in effect commodity rates, consisting principally of rates covering certain commodities for certain distances or in certain territory, and class rates covering certain territory and certain cases existing because of the peculiar circumstances and conditions governing the situation, which are and have always been much lower than the class rates quoted and set out in the tables filed with the opinion of the Commission and especially with said Tariff No. 2. That said rates are in many if not all circumstances so low as to be unfair, unjust and unreasonable to complainant if taken and accepted in connection with the tariff of rates promulgated by the Railroad Commission, and in many if not all instances said commodity rates, and many of said rates belonging to some one or more of said classes of rates, are considerably lower than similar rates in force upon other railroads, competitors of complainant for business, and that the said order of the Commision quoted as aforesaid forbids complainant to raise or advance, but requires complainant to retain the aforesaid commodity and certain class rates regardless of whether the said rates are too low or unreasonably low or confiscatory, and complainant says that as required by the said Commission to be maintained they are unfairly and unjustly low and are confiscatory and violative of Section 1 of Article XIV of the Constitution of the United States as depriving complainant of its property without due process of law. That said commodity rates and said certain class rates are now considerably lower than the rates fixed and promulgated by said Railroad Commission in said Tariff No. 2, that none of said rates has been investigated by the Commission and that complainant is by said order of the Commission forbidden to raise or advance the said commodity and certain class rates regardless of their justness, fairness or reasonableness, although considerably and materially lower, as aforesaid, than the rates fixed by the Commission as in its opinion fair, just and reasonable.

5. Complainant avers that its gross receipts from intrastate freight traffic for Kentucky, carefully estimated and approximated, for the fiscal year ending June 30, 1905, were $733,191.00 earned at the rates then and now in force upon complainant's railroad in Kentucky, and that upon the same volume of traffic transported at the same expense—and complainant avers that there is no reason

to believe that the volume of traffic would increase or the expense decrease—the income calculated upon the rates proposed by the Commission if enforced would yield to complainant gross receipts from said intrastate freight traffic in Kentucky, carefully estimated and approximated, $49,744.00 less than $733,191.00, and would reduce complainant's gross receipts from such traffic nearly *seven* per cent., and its net receipts therefrom several times such per cent., if, indeed, any net receipts whatever were realized by complainant; and reduce by necessary and direct operation, complainant's interstate commerce returns more than double $49,744.00.

17 6. Complainant avers that in the amended complaint aforesaid of said Guenther and others, the petition of the lumber men aforesaid and the petition of the Commonwealth, the Louisville & Nashville Railroad Company, Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky, the Lexington & Eastern Railroad Company, the Louisville, Henderson & St. Louis Railway Company, complainant Illinois Central Railroad Company, and all other railroads operating lines in Kentucky, but unnamed in the petition, were called defendants, and that the said order of said Railroad Commission is directed against only the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company, Cincinnati, New Orleans & Texas Pacific Railway Company, Southern Railway Company in Kentucky, and the Nashville, Chattanooga & St. Louis Railway Company, a company not included by name but only in the general designation in said petition of "all other railroads that operate their lines in the State of Kentucky." That defendants, the said Railroad Commission, have made no order against the Lexington & Eastern Railroad Company, the Louisville & Atlanta Railroad Company, the Louisville, Henderson & St. Louis Railway Company, nor sundry other companies having and operating railroad lines in the State of Kentucky, although said named railroad companies and divers other railroad companies unnamed have and during all the time aforesaid have had in force and effect rates materially higher than those of complainant and higher than those prescribed in the said order to be observed by the six railroad companies embraced

18 in the said order, which rates of said other companies are charged the public under substantially similar circumstances and conditions to some one or other of the railroad companies named in the said order, and complainant accordingly avers that the said order is for said reason partial, unjust and discriminatory, in excess of the power of the said Commission and denies to complainant the equal protection of the laws; and complainant avers that it has in force, and has at all said times had in force commodity rates and certain class rates considerably lower than the class rates fixed and promulgated in the order aforesaid and materially lower than similar commodity rates and class rates charged by complainant's competitors in the same territory, and that by reason of the prohibition of complainant's advancing the said lower rates it is prevented from charging as high rates as its competitors are permitted by the said order to charge by the aforesaid Tariffs Nos. 1

and 2 fixed by the Commission whereby complainant is by the said order denied the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment aforesaid to the Constitution of the United States.

7. Complainant avers that before the attempted revision of its rates by the said Commission, said rates were reasonable and just and a fair and just remuneration, and no more, for the services rendered by complainant in the transportation of intrastate freight in Kentucky, and no more than a fair and just return upon the capital of complainant invested in the railroad, terminal facilities, equipment and other property embarked in the transportation of freight between points in Kentucky, and that the commodity rates and the aforesaid certain class rates lower than the rates in the schedule of maximum rates aforesaid were so low as to yield far less than a fair or just return to the complainant for the services
19 rendered, or as income upon capital invested as aforesaid, and that nevertheless, as aforesaid, complainant is forbidden by the order of the Commission to advance the said rates although no complaint was ever made of said rates or any of them, except as aforesaid, nor of any rates charged by complainant except upon the general undefined and wholesale complaint made by Guenther and others, and abandoned by them, and made by the Commonwealth in its aforesaid unauthorized complaint.

8. Complainant is advised and, accordingly, charges that the aforesaid act of March 10, 1900, is in conflict with Article IV, Section 4 of the Constitution of the United States guaranteeing to every State a Republican form of government, and of Sections 27, 28, 109 and 135 of the Constitution of Kentucky dividing the powers of government into three distinct departments, and forbidding any person or collection of persons being members of one of such departments exercising any power properly belonging to either of the others because said act assumes to confer upon said Railroad Commission legislative, judicial and executive powers.

That said act of March 10, 1900, is in conflict with Article I, Section 8, Sub-section 3 of the Constitution of the United States in assuming to regulate interstate commerce, the regulation whereof is by said provision of said Constitution confided to the Congress; and in conflict with Article VIII of the Amendments to said Federal Constitution, and Section 17 of the bill of rights of the Constitution of Kentucky in assuming to impose and providing for the imposition of excessive fines and penalties.

That said act of March 10, 1900, is in conflict with Section 1 of Article XIV of the Amendments to said Constitution of the
20 United States in denying to complainant the equal protection of the laws by placing complainant and other railroad companies in the State of Kentucky under the arbitrary power of said Railroad Commission and compelling them to litigate concerning the reasonableness of their rates under peril of excessive fines and penalties in case of defeat in said litigation while common carriers other than carriers by railroad are not subjected to such arbitrary powers nor such perils; and in subjecting complainant and other

railroad companies in Kentucky to the regulation by such Railroad Commission of their rates and charges while other common carriers are not so subjected; and in requiring complainant and said other railroad companies to submit to the *fiat* of said Railroad Commission in fixing a rate of toll or charge for transportation with no opportunity for judicial investigation and no opportunity to make defense in court as to the reasonableness, justice or fairness of said rate or as to whether or not said rate be confiscatory except at the peril of enormous and ruinous fines and penalties in case of failure of complainant and such other railroad companies to make good their claims in said judicial proceedings while other transportation companies are subjected to no such burdens.

That said act is in conflict with said Section 1 of Article XIV of the Amendments aforesaid because it denies to complainant and said other railroad companies due process of law in requiring them to submit to charge any rate of freight whatsoever fixed by said Railroad Commission, whether fair or just or not, and whether confiscatory or not with no opportunity for a judicial determination of the question of fairness or justice of said rate, or whether it
21 be confiscatory or not; and with no opportunity to make any defense to any indictment instituted because of the failure or refusal of complainant or one of its officers, agents or employés to charge the rate fixed by said Commission, or of the act of complainant, its officer, agent or employé in charging a higher rate than the rate fixed by said Commission except at the peril of paying excessive and ruinous fines and penalties in case of failure to make successful defense to said indictment or indictments, and because said act permits no defense at all to the indictment provided for in the act.

9. Complainant further shows that the Railroad Commission aforesaid, a department or instrumentality of the government of the State of Kentucky aforesaid, created by the Constitution of said State and especially by Section 209 of said Constitution adopted September 28, 1891, by its aforesaid acts in reducing the rates of toll and charges aforesaid employed by complainant by the amounts aforesaid, if permitted to put said threatened schedule of rates into effect will deprive complainant of its property without due process of law by compelling it as a common carrier to perform the service of transportation of freight between points in the State of Kentucky without a fair or just remuneration, if any, and for a toll and charge which would not yield to complainant a fair or just remuneration, if any, for the services rendered, but would amount to a confiscation of the property of complainant embarked in such transportation, and take such property for public use without compensation.

Complainant avers that by reason of the facts hereinbefore set out it would suffer great and irreparable damage and injury
22 incalculable and not subject to computation in many thousands of dollars, and that the matter and amount in dispute in this suit exceeds, exclusive of interest and costs, many times two thousand dollars, that complainant is without adequate remedy at law

and can have relief only in a court of equity where matters of the sort are properly cognizable and relievable; that a resort to a court of equity is necessary to prevent and avoid a great multiplicity of suits on behalf of shippers and consignees, and on behalf of the Commonwealth or Railroad Commission to enforce the aforesaid fines and penalties prescribed by the aforesaid act of March 10, 1900, and other statutes of Kentucky.

In consideration whereof, and for as much as complainant is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity where matters of the kind are properly cognizable and relievable, complainant prays that the defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, as Railroad Commissioners of the State of Kentucky, their employés and representatives be enjoined and restrained from putting into effect on the 29th or 30th day of July, or at any other time, Tariff No. 2 prescribed in its order aforesaid, or any other tariff of rates lower than the rates now in force upon the railroads in Kentucky operated by complainant, and from forbidding complainant to raise or advance its commodity rates or such other rates as are lower than the rates prescribed in said tariff promulgated by said order, or in requiring or attempting to require complainant to charge any less rate of toll or freight than is now charged by complainant as aforesaid for the transportation of freight between points in Kentucky, and from causing complainant to be indicted
23 or otherwise proceeded against or punished for failing or refusing to charge the rates of toll or charges fixed by the said order or tariffs promulgated therewith as threatened by the Commission, or for charging any other rate higher than the rate so fixed or threatened by the Commission as aforesaid, and enjoined and restrained from instituting against complainant, its officers, agents or employés, any actions or other proceedings, or causing it or its officers, agents or employés to be indicted or otherwise prosecuted in any of the courts of the Commonwealth of Kentucky or elsewhere because of complainant's failure or refusal to charge the rates fixed by the tariff promulgated as aforesaid or different rates from those now charged by complainant, and may it please your honors to grant unto complainant a writ of subpœna of the United States of America issuing out of, and under the seal of this honorable court directed to the said defendants, McChord, Siler and Ferguson, as Railroad Commissioners aforesaid, commanding them on a day certain to be named therein, and under a certain penalty to be and appear before this honorable court, and then and there to answer but not under oath, such oath being hereby expressly waived, all and singular the premises, and to stand to perform and abide such order, direction and decree as may be made against them in the premises and as shall to your honors seem to be meet and agreeable to equity and good conscience; that a temporary injunction may issue against the said defendants and each of them, their employés and representatives and all persons acting or claiming to act by, through or under them or any of them agreeably to the prayer aforesaid, and that mean-

while a temporary restraining order to the same effect be
24 issued and that upon the hearing of this cause and entry of a decree herein said temporary injunction may be made perpetual. That in and by said restraining order, temporary and final injunctions, said defendants, their employés and representatives and all other persons acting or claiming to act for them, or through them, be enjoined and restrained from putting into effect the Tariff No. 2 aforesaid promulgated by the order of the Commission aforesaid and from enforcing or attempting to enforce the said order or tariff or any other tariff against complainant, and from interfering in any manner with complainant in the transaction of its business aforesaid at the rates now in force upon its lines; and may it please your honors to grant unto complainant such other and further relief as the circumstances of the case require, and to your honors shall seem meet, and complainant, as in duty bound, will ever pray.

ILLINOIS CENTRAL RAILROAD COMPANY,
By TRABUE, DOOLAN & COX, *Counsel.*

25 STATE OF KENTUCKY,
Jefferson County, sct:

Charles C. Cameron being duly sworn says, upon oath, that he is the General Freight Agent of the lines of complainant south of the Ohio River, including the lines in Kentucky, that there is no executive officer of complainant now in Kentucky, nor any other officer higher in rank than affiant, that the averments of the foregoing bill of complaint are true so far as the facts are averred directly, and that so far as they are stated upon information or advice he believes them to be true.

CHARLES C. CAMERON.

Subscribed and sworn to before me by Charles C. Cameron in Jefferson county, Kentucky, this 24th day of July, A. D. 1906. My commission as Notary Public expires February 15, 1908.

[SEAL.] V. C. YEAGER,
Notary Public, Jefferson Co., Ky.

26 The foregoing Bill of Complaint is endorsed in words and figures as follows, viz: Filed July 25th, 1906, W. G. Chapman, Clerk.

Exhibit X, referred to in the foregoing Bill of Complaint, is in words and figures as follows, viz:

27 OPINION AND ORDER

OF THE

RAILROAD COMMISSION,

GOVERNING RATES

ON

GENERAL MERCHANDISE ON RAILROADS IN KENTUCKY.

THE COMMONWEALTH OF KENTUCKY, &C., Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

C. C. McChord, Chairman.

McDougall Ferguson, Com. First District. A. T. Siler, Com. Third Dist.

Louisville:
Geo. G. Fetter Company.
1906.

(Here follow facsimiles, Marked pp. 28, 29, 30 and 31.)

Comparison of Old Rates with Maximum Rates.

Kentucky Railroad Commisson's Standard Tariff No. 1.

APPLICABLE TO THE LOUISVILLE & NASHVILLE RAILROAD CO.

DISTANCES.	In Cents Per Hundred Pounds.												Per Bbl.	Per 100 lbs.	Car Loads Per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
For 10 miles and less	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
	12	10	9	8	7	6	6	6	5	5	6	6	10	6	5	4	3
Over 10 miles and not over 15	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
	15	13	12	11	10	9	9	9	6	6	9	9	12	9	6	5	4
15 miles and not over 20	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
	20	17	15	13	12	11	11	11	7	7	11	11	14	11	7	6	5
20 miles and not over 25	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
	23	20	17	15	14	13	13	13	9	8	13	13	18	13	9	7	5
25 miles and not over 30	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
	26	23	20	17	16	15	15	15	10	8	15	15	20	15	10	7	6
30 miles and not over 35	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
	29	25	22	19	18	17	17	17	11	9	17	17	22	17	11	8	6
35 miles and not over 40	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
	32	27	24	21	20	19	19	19	12	9	19	19	24	19	12	8	6
40 miles and not over 45	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
	35	30	27	23	22	21	21	21	13	10	21	21	26	21	13	8	7
45 miles and not over 50	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
	37	32	28	25	24	22	22	22	14	10	22	22	28	22	14	9	7
50 miles and not over 55	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
	39	34	30	26	25	23	23	23	15	11	23	23	30	23	15	10	7
55 miles and not over 60	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
	41	35	31	28	26	24	24	24	16	11	24	24	32	24	16	12	8
60 miles and not over 65	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
	43	37	33	30	27	25	25	25	17	12	25	25	34	25	17	12	8
65 miles and not over 70	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
	45	39	34	31	28	26	26	26	17	12	26	26	34	25	17	13	8
70 miles and not over 75	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
	47	41	36	32	29	27	27	27	18	13	27	27	36	25	18	13	9
75 miles and not over 80	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
	49	42	37	33	30	28	28	28	18	14	28	28	36	25	19	14	9
80 miles and not over 85	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
	51	44	39	34	31	29	29	29	19	15	29	29	38	25	19	14	9
85 miles and not over 90	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
	53	45	40	35	32	30	30	30	19	15	30	30	38	25	19	15	10
90 miles and not over 95	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	8
	54	46	41	36	32	30	30	30	19	15	30	30	38	25	19	15	10
95 miles and not over 100	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
	55	47	42	37	32	30	30	30	20	15	30	30	40	25	20	15	10
100 miles and not over 110	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
	56	48	43	38	33	31	31	31	20	15	31	31	40	26	21	16	11
110 miles and not over 120	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8
	58	50	44	39	34	32	32	32	21	16	32	32	42	26	22	16	11

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Applicable to the Louisville & Nashville Railroad Co.—Continued.

DISTANCES.	In Cents Per Hundred Pounds.												Per Bbl.	Per 100 lbs.	Car Loads Per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
120 miles and not over 130	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
	60	52	46	41	36	33	33	33	21	16	33	33	42	27	23	17	12
Over 130 miles and not over 140	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
	62	53	47	42	37	34	34	34	22	17	34	34	44	27	24	17	12
140 miles and not over 150	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
	64	55	49	44	39	36	36	36	22	17	36	36	44	28	25	18	13
150 miles and not over 160	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
	66	57	50	45	40	37	37	37	23	18	37	37	46	28	26	18	13
160 miles and not over 170	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
	68	59	52	47	42	38	38	38	23	18	38	38	46	29	27	19	14
170 miles and not over 180	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
	70	60	53	48	43	39	39	39	24	19	39	39	48	29	28	20	15
180 miles and not over 190	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
	72	62	54	49	44	40	40	40	24	19	40	40	48	30	29	20	15
190 miles and not over 200	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
	74	64	55	50	45	41	41	41	25	20	41	41	50	30	30	21	16
200 miles and not over 210	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
	76	65	56	51	46	42	42	42	25	20	42	42	50	30	31	21	16
210 miles and not over 220	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
	78	67	57	52	47	43	43	43	26	20	43	43	53	31	32	22	17
220 miles and not over 230	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
	80	69	58	53	48	44	44	44	26	20	44	44	52	31	33	22	17
230 miles and not over 240	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
	82	71	59	54	49	45	45	45	27	21	45	45	54	31	34	23	18
240 miles and not over 250	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
	84	72	60	55	50	46	46	46	27	21	46	46	54	32	36	23	18
250 miles and not over 275	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
	87	75	61	56	51	47	47	47	28	22	47	47	56	32	38	24	19
275 miles and not over 300	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
	90	77	62	57	52	48	48	48	28	22	48	48	56	32	39	25	20
300 miles and not over 325	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
	93	79	63	58	53	49	49	49	29	23	49	49	58	32	40	26	21
325 miles and not over 350	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
	96	81	64	59	54	50	50	50	29	23	50	50	58	33	42	27	22
350 miles and not over 375	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
	99	83	65	60	55	51	51	51	30	24	51	51	60	33	44	28	23
375 miles and not over 400	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
	102	85	66	61	56	52	52	52	30	24	52	52	60	33	46	29	24
400 miles and not over 425	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
	104	86	67	62	57	53	53	53	32	25	53	53	64	34	47	30	25
425 miles and not over 450	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19
	106	87	68	63	58	54	54	54	34	25	54	54	68	34	48	30	25

Black Figures are the Reduced Rates. Figures in Red are the Old Rates.

Comparison of Old Rates with Maximum Rates.

Kentucky Railroad Commission's Standard Tariff No. 2.

APPLICABLE TO THE ILLINOIS CENTRAL RAILROAD CO.

DISTANCES.	In Cents Per Hundred Pounds.												In ch., per bbl.	In Cents Per 100 Lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L.	M	N	O
Not over 10 miles and less	10 25	8 21	7 17	6 15	6 13	5 11	5 9	5 11	4 10	4 10	5 14	5 15	8 20	4 11	4 11	3 5	2 4½	2 4
Over 10 miles and not over 15	12 31	10 26	10 21	9 19	8 17	7 14	7 12	7 14	5 13	5 12	7 17	7 20	10 26	5 14	5 14	4 5	3 5	3 5
15 miles and not over 20	16 31	14 26	12 21	10 19	10 17	9 14	9 12	9 14	6 13	6 12	9 17	9 20	12 26	6 14	6 14	5 5	4 5	4 5
20 miles and not over 25	17 37	15 31	13 25	11 22	11 19	10 16	10 15	10 16	7 15	6 14	10 19	10 22	14 30	7 16	7 16	5 7	4 6	4 6
25 miles and not over 30	20 37	17 31	15 25	13 22	12 19	11 16	11 15	11 16	8 15	6 14	11 19	11 22	16 30	8 16	8 16	5 7	5 6	5 6
30 miles and not over 35	22 41	19 34	17 28	14 25	14 22	13 19	13 18	13 20	8 17	7 16	13 21	13 25	16 34	8 16	8 16	6 8	5 6	5 6
35 miles and not over 40	24 41	20 34	18 28	16 25	15 22	14 19	14 18	14 20	9 17	7 16	14 21	14 25	18 34	9 16	9 16	6 8	5 6	5 6
40 miles and not over 45	26 45	23 38	20 31	17 28	17 25	16 22	16 24	16 24	10 20	8 18	16 24	16 29	20 40	10 17	10 17	6 9	5 7	5 7
45 miles and not over 50	28 45	24 38	21 31	19 28	18 25	17 22	17 24	17 24	11 20	8 18	17 24	17 29	22 40	11 17	11 17	7 9	5 7	5 7
50 miles and not over 55	29 49	26 41	23 35	20 31	19 27	17 24	17 26	17 26	11 21	8 19	17 25	17 31	22 42	11 18	11 18	8 10	5 8	5 8
55 miles and not over 60	31 49	26 41	23 35	21 31	20 27	18 24	18 26	18 26	12 21	8 19	18 25	18 31	24 42	12 18	12 18	9 10	6 8	6 8
60 miles and not over 65	32 53	28 44	25 36	23 32	20 28	19 26	19 28	19 28	13 22	9 20	19 28	19 32	26 44	13 18	13 18	9 11	6 9	6 9
65 miles and not over 70	34 53	29 44	26 36	23 32	21 28	20 26	20 28	20 28	13 22	9 20	20 28	20 32	26 44	13 18	13 18	10 11	6 9	6 9
70 miles and not over 75	35 55	31 46	27 37	24 33	22 30	20 28	20 28	20 28	14 23	10 21	20 28	20 34	28 46	14 20	14 20	10 12	7 9	7 9
75 miles and not over 80	37 55	32 46	28 37	25 33	23 30	21 28	21 28	21 28	14 23	11 21	21 28	21 34	28 46	14 20	14 20	11 12	7 9	7 9
80 miles and not over 85	38 58	33 48	29 39	26 35	23 32	22 30	22 30	22 30	14 23	11 22	22 28	22 35	28 50	14 20	14 20	11 12	7 9	7 9
85 miles and not over 90	40 58	34 48	30 39	26 35	24 32	23 30	23 30	23 30	14 23	11 22	23 28	23 35	28 50	14 20	14 20	11 12	8 9	8 9
90 miles and not over 95	41 60	35 50	31 41	27 36	24 32	23 30	23 30	23 30	14 26	11 23	23 30	23 36	28 52	14 21	14 21	11 13	8 9	8 9
95 miles and not over 100	41 60	35 50	32 41	28 36	24 32	23 30	23 30	23 30	15 26	11 23	23 30	23 36	30 52	15 21	15 21	11 13	8 9	8 9
100 miles and not over 110	42 61	36 51	32 42	29 37	25 33	23 31	23 31	23 31	15 27	11 24	23 31	23 37	30 54	16 22	16 22	12 14	8 10	8 10

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Applicable to the Illinois Central Railroad Co.—Continued.

DISTANCES.	In Cents Per Hundred Pounds.												In cts. per bbl.	In Cents Per 100 Lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
110 miles and not over 120	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8
	62	52	42	37	33	32	32	32	27	24	32	37	54	22	22	15	10	10
120 miles and not over 130	45	39	35	31	27	25	25	25	16	12	25	25	32	17	17	13	9	9
	64	53	43	38	34	33	33	33	26	24	33	38	56	23	23	15	10	10
er 130 miles and not over 140	47	40	35	32	28	26	26	26	17	13	26	26	34	18	18	13	9	9
	65	54	44	39	35	34	34	34	28	24	34	38	56	24	24	15	10	10
140 miles and not over 150	48	41	37	33	29	27	27	27	17	13	27	27	34	19	19	14	10	10
	66	56	45	41	36	35	35	35	30	25	35	38	60	25	25	16	11	11
150 miles and not over 160	50	43	38	34	30	28	28	28	17	14	28	28	34	20	20	14	10	10
	66	57	46	42	37	36	36	36	32	25	36	38	64	26	26	16	11	11
160 miles and not over 170	51	44	39	35	32	29	29	29	17	14	29	29	34	20	20	14	11	11
	68	59	48	44	39	38	38	38	33	25	38	40	66	28	28	17	12	12
170 miles and not over 180	53	45	40	36	32	29	29	29	18	14	29	29	36	21	21	15	11	11
	70	61	50	46	40	39	40	40	34	25	39	41	68	29	29	17	12	12
180 miles and not over 190	54	47	41	37	33	30	30	30	18	14	30	30	36	22	22	15	11	11
	71	62	51	47	41	40	41	41	34	25	40	42	68	30	30	17	12	12
190 miles and not over 200	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12	12
	72	63	52	48	42	40	42	42	34	25	40	42	68	30	30	17	12	12
200 miles and not over 210	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12	12
	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
210 miles and not over 220	59	50	43	39	35	32	32	32	20	15	32	32	40	24	24	17	13	13
	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
220 miles and not over 230	60	52	44	40	36	33	33	33	20	15	33	33	40	25	25	17	13	13
	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
230 miles and not over 240	62	53	44	41	37	34	34	34	20	16	34	34	40	26	26	17	14	14
	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
240 miles and not over 250	63	54	45	41	38	35	35	35	20	16	35	35	40	27	27	17	14	14
	82	72	59	54	48	46	48	48	36	25	46	48	72	36	36	18	13	13
250 miles and not over 275	65	56	46	42	38	35	35	35	21	17	35	35	42	29	29	18	14	14
	85	75	61	56	50	47	49	49	36	25	48	49	72	38	38	18	13	13
275 miles and not over 300	68	58	47	43	39	36	36	36	21	17	36	36	42	29	29	19	15	15
	88	77	63	57	52	48	50	50	36	25	50	50	72	39	39	18	13	13
300 miles and not over 325	70	59	47	44	40	37	37	37	22	17	37	37	44	30	30	20	16	16
	91	79	64	58	53	49	51	51	36	26	51	51	72	41	41	19	14	14

Black Figures are the Reduced Rates. Figures in Red are the Old Rates.

32 Before the Railroad Commission.

THE COMMONWEALTH OF KENTUCKY, &c., Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

Opinion and Order of the Commission.

The several complaints which, for convenience, have been consolidated and heard together in this investigation, raise for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon all railroads to and from all points within the State. Throughout the entire investigation this Commission has not been unmindful of the very great importance of the issues involved to the shippers and consumers throughout the Commonwealth as well as the railroads. It has been our endeavor to ascertain the truth in order that we might intelligently discharge our duties under the law. And we approach the determination of this exceedingly important case fully impressed with the magnitude of the responsibility thus devolved upon the Commission and the propriety of rendering a decision, which, under a broad view of all the attending circumstances, may be characterized as fair and just.

The annual reports of all the railroads for the fiscal year ended June 30, 1905, show the total mileage in the State to be 3,374, the total gross receipts $34,856,447, total net receipts $9,754,957. The valuation placed by the Railroad Commission upon all the tangible property of these railroads was for the year indicated $61,149,924.

Our investigation of the rate situation shows that all rates
33 charged by the railroads in Trunk Line and Central Freight Association territory, which is that territory north of the Ohio and east of the Mississippi rivers, to and from points on the Ohio river are very much lower than are the rates south of the Ohio river. Through rates are made to the Ohio river, but to points south of the Ohio river the full local rates are added to the through rates. We find that the principal portion of Kentucky is served by the Louisville & Nashville, the Illinois Central, the Southern Railway in Kentucky, the Cincinnati, New Orleans & Texas Pacific and the Chesapeake & Ohio Railway.

As regards the adjustment of rates, we find that the present rates upon all these railroads have been in effect for many years. In fact, very few changes in rates have been made except to occasionally lower or raise some of them, notwithstanding the fact that the volume of business has very greatly increased and the receipts of all the roads have steadily grown and the remarkable improvement in motive power and equipment enables them to handle the traffic with much less labor and cost proportionate to the volume of business done.

The lowest rates charged by any of the defendants are those charged by the Cincinnati, New Orleans & Texas Pacific Railway

Company, and this road has forced the Louisville & Nashville Railroad Company on its Kentucky Central Division, embracing 254 miles, and also the Southern Railway in Kentucky, to meet its rates. It is claimed by the defendants that the rates charged by the Cincinnati, New Orleans & Texas Pacific Railway Company are entirely too low, and the fact is cited that some years ago this road was forced into bankruptcy, and that the Kentucky Central Division of the Louisville & Nashville Railroad Company, which was formerly an independent corporation, was likewise forced into bankruptcy, as was also the Louisville Southern Railway, now the Southern Railway in Kentucky. It is earnestly contended that it would not be fair to require the other railroads in the State to reduce their rates to those charged by the Cincinnati, New Orleans & Texas Pacific Railway Company.

It is true these roads were at one time forced into the hands of a receiver, but for years past they have been prosperous and money-makers. In fact, the defendant, the Louisville & Nashville Railroad Company, which is conceded to be a good business institution, purchased the Kentucky Central Railroad, knowing that it would be compelled to charge the low rates forced upon it by the Cincinnati, New Orleans & Texas Pacific Railway Company. Under this adjustment of rates this latter road serves points like the city of Cincinnati and patrons on its line, with but few exceptions, at rates 25 per cent. lower than the Louisville & Nashville and Illinois
34 Central serve their patrons out of the city of Louisville and patrons on their lines, except that to points on the Kentucky Central Division of the Louisville & Nashville south of Paris, the Louisville & Nashville Railroad Company serves its patrons out of Louisville at the Cincinnati rate.

It will thus be seen that under the present adjustment of rates one section of the State is served upon better terms than the others. It is argued that the various communities throughout the State and business institutions have been built up and fostered under the present adjustment of these rates, and that any radical departure from this adjustment would be disastrous not only to the shippers, but to the communities served by the railroads.

The Commission has endeavored to weigh all the facts and to familiarize itself with the conditions as they actually exist, and we do not believe any such disastrous results will follow the conclusions we have reached in this investigation.

The several complaints herein allege that all the rates upon all the railroads in the Commonwealth of Kentucky are unjust, unreasonable, extortionate and discriminatory. In view of the fact that most of the traffic in Kentucky is carried, and a greater portion of the State is traversed and served by six of the principal railroads, to-wit: The defendants, the Louisville & Nashville, the Illinois Central, the Chesapeake & Ohio, the Louisville, Henderson & St. Louis, the Cincinnati, New Orleans & Texas Pacific and the Southern Railway in Kentucky, this investigation has, so far, been mainly confined to these six roads. Copies of each complaint were furnished to the defendants, all of whom filed answers in which each and all

denied that their rates as a whole or any part thereof are either unjust, unreasonable, extortionate, or discriminatory.

In order to intelligently pass upon these questions and to enable the Commission to have all information possible to be obtained bearing upon the question of rates and the operation of the railroads, a series of questions was propounded to each of the defendants pertaining to their capitalization, construction, operation, value and general conduct of their business as common carriers in relation to traffic wholly within the State. The defendants were requested to furnish statements showing the actual amount of freight and passenger traffic in Kentucky, both intrastate and interstate, the receipts, the cost of operation, and all other operating statistics for the year 1905. After these questions were propounded the defendants represented to the Commission that to furnish this information for the entire year would cause a delay of nearly twelve months and involve a vast amount of labor and expenditure of a large sum of money. It was therefore, agreed that four representative months should be selected, and that the information called for should be esti-
35 mated for the entire year upon the showing for the months so selected. The defendant, the Louisville & Nashville Railroad, operating the largest mileage in the State, 1,265 miles, supplied the required information in greatest detail, though by no means as full and satisfactory as might have been expected, while the other defendants failed to furnish the information requested in such form and extent as to equal in value that furnished by the Louisville & Nashville. Indeed, in the whole conduct of this case, the burden of justification laid upon all the defendants has been largely borne by the Louisville & Nashville Railroad.

A number of extended hearings have been had, and each defendant has been given the widest latitude and the fullest opportunity to justify the rates in issue, and all have been urged to furnish to the Commission all facts having a tendency to throw light upon the subject and to facilitate bringing out everything pertinent to the inquiry.

The Commission understands that the theory of the defense of each of the defendants, and particularly that of the Louisville & Nashville Railroad, is based upon the plan which seems to have been agreed upon by complainants and the railroads in the case of Smyth *v.* Ames, wherein the percentage of operating expenses to gross receipts in Nebraska was used to measure the cost of doing all the business. The defendants herein have fallen into the same error that was committed in the Nebraska case, as we shall hereinafter endeavor to demonstrate. However, certain general rules or principles are stated by the Supreme Court of the United States in the cases of Smyth *v.* Ames, 169 U. S., 466, and the Minneapolis & St. Louis Railroad Co. *v.* Minnesota, 186 U. S., 267, and which, taken together, appear to embrace the following propositions:

1. The value of the property used by the carrier in the service must be ascertained, or, at least, justly estimated.

2. While the amount and value of the stock and bonds must be considered, such amount and value are in no way conclusive upon

the question of the actual property value, as the amount and market value of stocks and bonds can only bear upon that question by way of comparison. The actual property value is the cost of reproduction with such deductions therefrom as may be necessary to represent depreciation and thereby indicate the present condition
36 of the property. If the actual property value is independently determined, that value can not be increased or decreased by the amount of securities the company has seen fit to issue.

3. *A sufficient return from operation must* be allowed to provide for necessary operating expenses and for taxes as a current yearly charge, and the operating expenses include such renewals and repairs as are necessary to keep up the property.

4. While the allowance should be made to pay a proper return upon the ascertained fair valuation of the property used in the service involved, it must always depend upon the circumstances of the road, manner and method of its operation, the character and amount of the traffic involved, and the extent to which the question is affected by the paramount right of the public to enjoy reasonable transportation charges.

These principles are all definitive of the prohibition in the Federal Constitution that no person shall be deprived of his property without due process of law or be denied the equal protection of the laws. While this restriction exists and must not be invaded, the decisions of the court of last resort give finality to the action of the State, acting through its Legislature, or a commission exercising properly delegated powers.

It was apparently contended in the Smyth-Ames case on behalf of those attacking the Nebraska rates fixed by the Legislature, just as it is here, that it cost from 10 to 25 per cent. more to conduct the purely intrastate business than it did to conduct the average of all business within the State, and that this excess cost or per cent. should be added to the proportion of operating expenses to gross receipts for all traffic to indicate the cost to the carrier for the intrastate business. But it does not appear that this contention was seriously disputed or opposed in any such way as to attract the attention of the court. In other words, this theory for ascertaining the cost of doing the State traffic seems to have been conceded by counsel for the State as well as for the railroads in the Nebraska case. The only point of difference regarding this proposition seems to have been that counsel for the State of Nebraska contended that the gross receipts and the operating expenses from all traffic within the State of Nebraska should be considered, whereas the contention of the attorneys for the railroad was that only the purely State
37 traffic should be considered without reference to what the roads earned upon interstate traffic, or what it cost to produce the interstate traffic. It may be true that the rates charged on the purely State business in Nebraska may have been already so low that taken in gross as represented in total earnings from that business and compared with the actual expenses for doing the intrastate business, the percentage of these expenses to these earnings was,

in fact, at least 10 per cent. more than the percentage of operating expenses to earnings from all traffic.

However this may be, we are of the opinion that the theory of those acting for the carriers in the Nebraska case, as is the theory advanced by council in the case at bar, that the percentage of operating expenses to gross receipts represents cost, was, and is, wholly untenable.

The answers and statements made by the defendants embrace claims of greater cost of operation for the purely State freight traffic ranging from 10 to 25 per cent. above the average cost of doing all the State and interstate business of Kentucky on their respective lines. The defendants have insisted upon a method of stating this increase cost which calls for discussion of this opinion. The Louisville & Nashville, though doing a much larger State freight business than any other carrier in Kentucky; and whose aggregate traffic also greatly exceeds that of any other defendant, asserts that the greater cost of doing the State freight business amounts to 25 per cent., and in stating its claim this company takes the percentage of its total operating expenses to total earnings in Kentucky, State and interstate included, which is reported as 69.16 per cent. and adds 25 per cent. thereto to cover the cost of the State business. This amounts to 94.16 per cent. of the total earnings from intrastate freight in Kentucky. And to this it also adds a proportion of the State taxes amounting to 3.42 per cent., giving a total of 97.58 per cent. of the gross earnings on State freight as its asserted cost of carrying such freight.

The fallacy of these claims lies in the fact that 69.16 per cent. does not stand for total cost at all, nor for any part of the cost. The factor 69.16 simply represents the relation between the total cost expressed in dollars and cents and the total receipts expressed
38 in dollars and cents. The cost and the earnings may both be high or both be low, and yet the same relation may exist. The cost of doing a particular part of the whole traffic may be more than of average cost, and yet the per cent. of that cost to high earnings on that particular traffic may be less than the percentage of the whole cost to the gross earnings. The expense, or cost, to the carrier of a given amount of transportation has no necessary connection with the earnings, or profits derived from that transportation. Since the cost, either total or average, is ascertainable solely from its own elements, it can never be expressed by percentage.

Suppose a line of road carried for a given period only three tons of freight and no passengers, its total operating charge being applicable to the earnings of those three tons, and assume the following costs and charges for each ton:

A. One ton, cost.....	70 cents.	Earnings or charge.....	90 cents.
B. One ton, cost.....	60 cents.	Earnings or charge.....	80 cents.
C. One ton, cost.....	20 cents.	Earnings or charge.....	80 cents.
Three tons, cost.....	$1.50.	Total earnings or charges.	$2.50

The percentage of the operating expenses, or total cost, to the total or gross earnings would be ($1.50 divided by $2.50) 60 per cent.

The general or average cost would be ($1.50 divided by 3), 50 cents per ton. Now, suppose it is desired to state by percentage how much more "ton A cost than the general or average cost of 50 cents. Knowing the cost of "ton A" to be 70 cents, and the general cost to be 50 cents, it is readily found that the difference is 40 per cent. It can, therefore, be claimed, and by correct mathematics demonstrated, that "ton A" cost the carrier to transport it, 40 per cent. more than the general average cost.

Now, if it is desired to state by percentage the cost of "ton A" (70 cents) to the earnings or charge for the transportation (90 cents), the percentage is easily found by dividing 70 cents by 90 cents, with a result of 77.77+per cent., or 17.77+per cent.
39 in excess of the 60 per cent. relation of total expenses to gross earnings.

In the same way, and by the same rule of computation, "ton C," which cost the carrier only 20 cents to transport and yield an earning charge of 80 cents, shows a percentage of cost to the earning charge of only 25 per cent., or 35 per cent. less than the 60 per cent. relation of the total expenses to gross earnings.

If, instead of ascertaining the true percentage of cost to the earning charge for *ton* "ton A" to be 77.77+per cent., a claim is set up that "ton A" costs 40 per cent. more than the general or average cost, and should on that account be added to the percentage of total operating expenses to gross earnings (60 per cent.), the addition makes the claimed cost of "ton A" (40 per cent. plus 60 per cent.) 100 per cent. and consequently that "ton A" was carried without any profit whatever.

Carrying the illustration to its logical conclusion, the same comput-tion must be made for "Ton C," which cost 20 cents to transport, and 30 cents less than the average or general cost of 50 cents. This difference of 30 cents is 60 per cent. of the general or average cost. If the cost above the general average or average cost of "ton A" is to be added to the percentage of total operating expenses to gross earnings (60 per cent.), then for "ton C" the cost of its transportation below the general or average cost must be deducted from the percentage of total operating expenses to gross earnings (60 per cent.). As the cost of "ton C" is 60 per cent. less than the general or average cost, it follows, by this rule, that it costs nothing whatever to transport "ton C," and that the charge received for its earnings was all profit. The foregoing illustration, or example, we think, puts before the mind in the simplest form the wide distinction between actual cost or actual general cost on the one hand, and on the other hand percentage or total cost to total earnings, and shows, *reductio ad absurdum*, the total inadmissibility of the defendants' claim for a minimum cost to it for doing the intra-state Kentucky business represented by adding 25 per cent. to 69.16 per cent. (the percentage of all expenses to all earnings) and making a total of 94.16 per cent., to which it adds taxes, 3.42

per cent. asserts a total cost of that business of 97.58 per cent. A claims of 28 per cent. additional and on this basis, instead of 25 per cent. would have extinguished every vestige of profit and put it in the position of transporting the large intra-state traffic in Ken-
40 tucky at a positive loss, thereby adding unjustly to the burden of the interstate business.

The examples above given show that the ratio of operating expenses to earnings is in no sense the statement of the actual cost, and the cost can not, viewed by itself, be expressed by percentage at all. Whatever the facts as to the actual cost may have been in the Nebraska case, it is, we think, quite clear that in this case the cost is one thing and the percentage or ratio of expenses to earnings is an altogether different thing, and that neither can be used to express or indicate the other. It is not too much to say of the Nebraska case that the contentions of the attorneys for the State were directed chiefly to establish the proposition that the action of the State could not be declared invalid unless the rates fixed should result in a loss from the operation of the road in all business, interstate as well as State, and that the assertion of the State's authority played a principal part in their arguments, resulting possibly in failure to analyze the testimony or to supply necessary testimony on behalf of the State.

With all this, however, the Kentucky Commission has nothing to do. Whether the theory of the defense as applied to the facts of the case is correct or incorrect, and what the actual situation is, are the chief matters for determination in respect of cost. That such theory of the defense is altogether inadmissible is plain from the foregoing analysis.

We are of the opinion that the term or factor used by the defendants for the purpose of stating the cost of doing the State freight business and all statements submitted which are based upon the use of that term or factor, can not be accepted.

At the request of the Commission, the defendant, the Louisville & Nashville Railroad, submitted a statement showing in detail its apportionment of operating expenses between passenger and freight business. We have endeavored to make a fair analysis of this statement, in order to arrive at a fair approximation of the cost to that defendant for doing the freight service in Kentucky during the year 1905, upon a ton-mile basis, which is the correct basis, and have endeavored to so apportion this cost as to show the relative cost per ton-mile of intra-state and interstate freight traffic. This analysis shows that there is properly chargeable to such freight traffic the sum of $6,535,753.09, of which there is chargeable to haulage or transportation proper, $5,014,823.22, and to services other
41 than haulage or transportation $1,520,929.87. The sum total of the items charged against haulage, is $5,014,823.22, is fairly apportionable between State freight and interstate freight upon the basis of ton-miles of haul of each, while the sum total of all other items, $1,520,929.87 is fairly apportionable between these two classes of freight upon the basis of tons of each.

The total number of tons of freight carried, both State and inter-

state, within the State of Kentucky during the year in question is, according to the returns of the defendant, 9,358,270, and that the total number of ton-miles of transportation during the same period within the State of Kentucky is 1,291,340,617. The average haul of State freight was 96.97 miles. The average haul of interstate freight was 148.82 miles. Dividing that portion of the charge, $1,520,929.87, the amount to be apportioned upon the basis of tons, by the total number of tons, 9,358,270, gives an average charge per ton for station, loading and unloading, advertising, damage, and the like, *i. e.*, for all services except haulage, of 16.25 cents. This charge being divided by the average haul of the State traffic (97.96) gives the corresponding charge per ton mile against State traffic on account of all services except haulage, amounting to .1659 cents. Dividing the same average charge per ton by the length of haul upon the interstate traffic, 148.82 miles, gives the average charge for this portion of the interstate service, .1092 cents.

The total charge for haulage, $5,014,823.22, divided by the number of ton-miles of haul, which is 1,291,340,617, gives the haulage charge per ton-mile, .3884 cents. Adding to this for the State traffic .1659 cents, gives the fair estimated cost of all services for State traffic per ton-mile, .5543 cents, while in like manner the fair estimated cost per ton-mile of interstate traffic is .4976 cents (the sum of .3884 cents and .1092 cents), thus showing that the fair estimate of the cost of conducting the State traffic per ton-mile is 11.4 per cent. higher than that of conducting the interstate traffic.

On the other hand, the earnings per ton-mile of State traffic are 1.307 cents, while those per ton mile of interstate freight are only .759 cents, showing that the gross profit per ton-mile of State freight is .753 cents as against .261 cents gross profit per ton-mile on interstate freight; so that at the rates now in force the gross profit per ton-mile on State traffic is nearly three times as great as that on interstate freight.

It will also be observed that where the State traffic costs
42 per ton-mile .5543 cents and brings in earnings of 1.307 cents per ton-mile, the operating ratio on the State traffic is 42.40 per cent., while on the interstate traffic, with a cost per ton-mile of .4976 cents and earnings per ton-mile of .759 cents, the operating ratio is 65.57 per cent.

The estimated valuation submitted by the Louisville & Nashville as showing the actual present value of the property is the only valuation shown, although this evidently contains a number of items open to serious question. This valuation, which applies to all the property in Kentucky and includes equipment as well as the physical property, is estimated at $70,530,727.91. The present supply of capital seeking investment is such that bonds upon railway property like that of the defendant can readily be marketed upon the basis of from 4 to 4½ per cent. annual return. Stock shares upon similar property can be readily marketed upon the basis of not to exceed 4 to 5 per cent. annual return, and an addition on the whole actual capital of about 1 to 1½ per cent. is usually ample allowance for accumulating surplus. The Louisville & Nashville stock

now sells currently at from 140 to 150, and is considered upon the market as fairly certain to yield 6 per cent. dividends, making the annual return upon the investment range from 4 2-7 to 4 per cent. That is to say, the investor who buys a share of Louisville & Nashville stock and pays for it $150 does not upon the expectation of deriving from it an annual dividend of $6, which is 4 per cent., upon his investment. He thus says that he considers, under all the circumstances, that 4 per cent. per annum is a fair rate of annual return upon the investment and one that he is willing to accept.

The annual addition to surplus in the Louisville & Nashville Railroad Company is somewhat less than the amount paid out in dividends, having been for the year ended June 30, 1905, about nine-tenths, and for prior years still less, and such devotion of income to surplus more than sufficiently insures the payment of dividends. It has, in fact, resulted in the accumulation of a surplus of undivided profits, beginning with June 30, 1894, and ending on June 30, 1905, which amounts to $14,899,106. This alone is more than sufficient to pay 6 per cent. dividends for four years. To obtain on this basis the average percentage by which to compute the annual allowance for the actual valuation, we take, on account of the funded debt, 2-3 of such capital at 4.25 per cent., which equals 2.83 per cent., on account of stock, 1-3 of such capital at 4.30 per cent.
43 which equals 1.43 per cent.; on account of accumulation and maintenance of surplus, an allowance of 1.30 per cent. is ample. These figures added together give a percentage of 5.56 per cent. and indicate that an allowance of 5.6 per cent. on account of charges upon capital is extremely liberal. This applied to the carrier's estimate of actual valuation of its Kentucky property, gives an annual charge on account of valuation, amounting to $4,450,488.75, including taxes which are stated to be $500,752.75.

To apportion this annual charge on account of valuation, first, as between the State and interstate passenger and freight business, and second, as between the State passenger and freight business, and do so with fair regard to the carrier's interests as well as those of the public, is a task of no little difficulty and one which we are not advised has been attempted heretofore in any similar case in any State, nor have we been assisted in this respect in any degree by the defendant carriers. We have before us simply the total actual valuation of the property in Kentucky as estimated by the carrier's consulting engineer. We have first had to determine the proper annual charge to be allowed for such valuation, and in doing so we have taken into account the market value of the carrier's stock and bonds and the maintenance of its surplus. Now, how shall this Commission, guided by no precedent, apportion this current annual charge of (in round figures) $4,450,500 and arrive at the proper portion of that charge to be laid against the State freight traffic of the defendant in Kentucky. Certainly neither gross earnings nor net earnings can be a satisfactory basis of apportionment of these charges for this purpose, particularly where the purpose of the apportionment is to determine the propriety of the rates from which these gross earnings and net earnings result.

In this case the earnings result from the rates in question. This annual charge for valuation is in a sense part of the carrier's cost, and to attempt to justify the apportionment of costs by the earnings resulting from rates, and then to justify the rates by the apportionment of costs based on the earnings resulting from the rates, would clearly be reasoning in a circle. Nor can any suitable basis for apportionment of this annual charge on account of valuation, be derived from transportation statistics relating to passengers and freight, for the obvious reason that there is no common transportation unit, except the train-mile or car-mile, and the use of the train-mile or car-mile would give no help in apportioning between State freight and interstate freight, because no trains are devoted solely to
44 either class of freight, nor is any considerable number of cars assigned exclusively to either class of freight.

Plainly, then, we have left only the operating expenses as a basis of apportionment. The operating expenses for all traffic in Kentucky are reported to be $10,127,126, the annual charge on account of valuation of $4,450,500 is 43.95 per cent. of the reported total cost of operation. The operating expenses chargeable against State freight, as made up from the figures furnished by the carrier are $1,235,023. Apply this factor of 43.95 per cent. to the estimated cost to the carrier of doing the State business gives $542,744 as the fair total charge to be made against the State traffic on account of actual valuation including taxes. Adding this sum $542,744 to the estimated operating expenses, $1,235,023, amounts to $1,777,767. This sum represents the operating expenses of the carrier on the State traffic in Kentucky in 1905, and a fair return to that carrier upon the use of its property in the conduct of that business for that year. This amount includes not only the fairly apportioned cost of operation and taxes, but also net earnings of 5.6 per cent. on the actual value of the property. It also includes, what have not been heretofore mentioned, a liberal allowance (more than 13 1-3 per cent. of reported operating expenses), out of which to make permanent improvements to the property, and a considerable sum amounting to $259,842.46 wrongfully charged against Kentucky in the statement of salaries paid to general officers and general office clerks. The salaries and wages paid to all general officers and general office clerks whose headquarters are at Louisville, despite the fact that their services are in large part on account of parts of the system, outside of Kentucky, were charged by the carrier wholly to Kentucky. We think these salaries and wages should be apportioned upon no higher basis than the average percentage shown for wages paid to other officers and other employés. The actual amount exacted by the Louisville & Nashville Railroad Company for the State freight service over its lines is $2,552,273.62. This exceeded the allowance above made, namely, $1,777,767.79, by $774,506.63.

The Commission does not of course, undertake to say that the computations, the results of which are hereinbefore set forth, are mathematically accurate, for it is universally conceded that any exact statement of the cost to a carrier for performing its freight service, as compared with its passenger service, or for performing a part of the

freight service as compared with the remainder, can not be made. The commission has merely done the best it could with the
45 figures and facts before it, but it has endeavored in all its computations to make the most liberal allowance for actual valuation. Yet, with all this, we have a result showing charges by this carrier for intrastate traffic within the State of Kentucky, which are more than $774,000 in excess of just and reasonable rates.

On account of the failure of the other defendants herein to furnish the data called for, the Commission has been forced to use that furnished by the Louisville & Nashville Railroad alone in making its analysis and, aside from the annual reports made by each of the defendants as to their earnings, very little information has been furnished by the other defendants that would be of any assistance to the Commission in making a similar analysis for each of them. The accounts of the railroads in Kentucky are not kept so as to show a separation of their intrastate and interstate earnings and operating expenses, and when called upon by the Commission to give this information they were forced to resort to the original way bills on file in their main offices and much delay was thereby occasioned. As an illustration of the enormous task which would be required to make a complete showing of all these earnings and operating expenses separately, it may be noted that for the Louisville & Nashville Railroad alone it would necessitate a separation and inspection of more than 250,000 way bills per month. As stated, the Commission was compelled to accept this data for four representative months, and the railroads were required to employ an extra force of clerks, in order to tabulate it, and when the information was furnished it was altogether unsatisfactory to the Commission as well as to the roads themselves. The Commission was very much surprised to see the very meagre showing made by each of the railroads regarding their intrastate traffic. It is not possible in this opinion to take up all these matters in detail. It is interesting, however, to note the several answers made to Question No. 28, "State Freight Earnings per mile of road in Kentucky."

Louisville, Henderson & St. Louis R. R.	$1,069 81
Illinois Central R. R.	1,435 62
Cincinnati, New Orleans & Texas Pacific Ry.	873 78
Southern Railway in Kentucky	1,728 67
Chesapeake & Ohio Railway	1,837 72
Louisville & Nashville R. R.	2,017 24
Lexington & Eastern Ry.	1,837 72
Louisville & Atlantic Ry.	1,886 11

46 When it is recalled that the gross receipts per mile for the year indicated, upon the Louisville & Nashville Railroad for all traffic in the State of Kentucky was $11,567 and that of the Illinois Central Railroad $10,932, the showing made by them as above stated as to their earnings per mile on intra-state freight is, to say the least, somewhat remarkable.

Other answers and statements might be taken up in detail and referred to, but, in view of the conclusions reached by the Commis-

sion, it is not deemed necessary to do so. Primarily all local rates are made upon a mileage scale. Each road has its own scale of rates made upon a mileage basis. These rates are departed from where circumstances and conditions in the opinion of the carrier warrant such departure in lowering the rates shown by this scale. An examination of these various mileage scales discloses the fact that different maximum rates have been adopted by the several defendants. We find that the scale of rates used by the defendants the Cincinnati, New Orleans & Texas Pacific Railway, are, as a rule, the lowest maximum rates of any of the defendants. It is also found that the Louisville & Nashville Railroad on its Kentucky Central Division has departed from its regular mileage scale and, on account of competition with the Cincinnati, New Orleans & Texas Pacific, the latter company's rates are in effect upon the Kentucky Central Division. We also find that the mileage scale of rates made by the Southern Railway in Kentucky are approximately the same as those upon the Cincinnati, New Orleans & Texas Pacific, while those upon the Illinois Central are much higher than those of either of the aforesaid defendants. Considerable irregularity prevails in some of these scales. We, however, find that the scale of the Louisville & Nashville Railroad as shown in its local freight tariff designated "Table A," is, to say the least, more uniform, but we are of the opinion that the rates therein shown for all distances, under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M and N, to and from all points wholly within the State of Kentucky are extortionate, unjust and unreasonable. It is, therefore, Ordered, That said defendant, the Louisville & Nashville Railroad Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodi-
47 ties to and from points wholly within the State of Kentucky, rates in excess of the rates shown in the following table for the classes and distances therein stated, to-wit:

Distances.	In cents per hundred pounds.												Per bbl.	Per cwt.	Car loads per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
Over 10 miles and not over 15..	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
15 miles and not over 20..	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
20 miles and not over 25..	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
25 miles and not over 30..	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
30 miles and not over 35..	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
35 miles and not over 40..	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
40 miles and not over 45..	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
45 miles and not over 50..	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
50 miles and not over 55..	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
55 miles and not over 60..	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
60 miles and not over 65..	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
65 miles and not over 70..	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
70 miles and not over 75..	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
75 miles and not over 80..	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
80 miles and not over 85..	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
85 miles and not over 90..	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
90 miles and not over 95..	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	8
95 miles and not over 100..	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
100 miles and not over 110..	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
110 miles and not over 120..	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8

Distances.	In cents per hundred pounds.												Per bbl.	Per cwt.	Car loads per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
120 miles and not over 130..	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
130 miles and not over 140..	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
140 miles and not over 150..	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
150 miles and not over 160..	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
160 miles and not over 170..	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
170 miles and not over 180..	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
180 miles and not over 190..	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
190 miles and not over 200..	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
200 miles and not over 210..	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
210 miles and not over 220..	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
220 miles and not over 230..	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
230 miles and not over 240..	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
240 miles and not over 250..	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
250 miles and not over 275..	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
275 miles and not over 300..	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
300 miles and not over 325..	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
325 miles and not over 350..	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
350 miles and not over 375..	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
375 miles and not over 400..	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
400 miles and not over 425..	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
425 miles and not over 450..	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19

Provided, however, That where said defendant, the Louisville & Nashville Railroad Company has in effect a tariff, or tariffs of rates, upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in
48 said Maximum Table of Rates, and herein designated "maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," said defendant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs.

The Commission is further of the opinion that the Maximum Mileage Scale of Rates published in Nashville, Chattanooga & St. Louis Railway Company's Local Tariff Number 7, effective May 1, 1900, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, L, M and N, are extortionate, unjust and unreasonable in so far as same are in excess of the rates herein fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company." It is, therefore, Ordered, That the said defendant, the Nashville, Chattanooga & St. Louis Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky, rates in excess of the rates shown in said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," and for the classes and distances therein stated.

Provided, however, That where said defendant, the Nashville, Chattanooga & St. Louis Railway Company has in effect a tariff, or tariffs, of rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The commission is further of the opinion that the maximum mileage scale of rates published in the Illinois Central Railroad Company's Local Freight Tariff No. A-1045, effective December 2, 1905, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, K, L, M, N, and O, are extortionate, unjust and unreasonable in so far as same are in excess of the rates hereinafter fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company." It is therefore, Ordered, That said
49 defendant, the Illinois Central Railroad Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky rates in excess of the rates shown in the following table for the classes and distances therein stated, to-wit:

Distances.	In cents per hundred pounds.												In cts. per bbl.	In cts. per 100 lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	4	4	3	2	2
Over 10 miles and not over 15..	12	10	10	9	8	7	7	7	5	5	7	7	10	5	5	4	3	3
15 miles and not over 20..	16	14	12	10	10	9	9	9	6	6	9	9	12	6	6	5	4	4
20 miles and not over 25..	17	15	13	11	11	10	10	10	7	6	10	10	14	7	7	5	4	4
25 miles and not over 30..	20	17	15	13	12	11	11	11	8	6	11	11	16	8	8	5	5	5
30 miles and not over 35..	22	19	17	14	14	13	13	13	8	7	13	13	16	8	8	6	5	5
35 miles and not over 40..	24	20	18	16	15	14	14	14	9	7	14	14	18	9	9	6	5	5
40 miles and not over 45..	26	23	20	17	17	16	16	16	10	8	16	16	20	10	10	6	5	5
45 miles and not over 50..	28	24	21	19	18	17	17	17	11	8	17	17	22	11	11	7	5	5
50 miles and not over 55..	29	26	23	20	19	17	17	17	11	8	17	17	22	11	11	8	5	5
55 miles and not over 60..	31	26	23	21	20	18	18	18	12	8	18	18	24	12	12	9	6	6
60 miles and not over 65..	32	28	25	23	20	19	19	19	13	9	19	19	26	13	13	9	6	6
65 miles and not over 70..	34	29	26	23	21	20	20	20	13	9	20	20	26	13	13	10	6	6
70 miles and not over 75..	35	31	27	24	22	20	20	20	14	10	20	20	28	14	14	10	7	7
75 miles and not over 80..	37	32	28	25	23	21	21	21	14	11	21	21	28	14	14	11	7	7
80 miles and not over 85..	38	33	29	26	23	22	22	22	14	11	22	22	28	14	14	11	7	7
85 miles and not over 90..	40	34	30	26	24	23	23	23	14	11	23	23	28	14	14	11	8	8
90 miles and not over 95..	41	35	31	27	24	23	23	23	14	11	23	23	28	14	14	11	8	8
95 miles and not over 100..	41	35	32	28	24	23	23	23	15	11	23	23	30	15	15	11	8	8
100 miles and not over 110..	42	36	32	29	25	23	23	23	15	11	23	23	30	16	16	12	8	8
110 miles and not over 120..	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8

110 miles and not over 120..	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8
120 miles and not over 130..	45	39	35	31	27	25	25	25	16	12	25	25	32	17	17	13	9	9
130 miles and not over 140..	47	40	35	32	28	26	26	26	17	13	26	26	34	18	18	13	9	9
140 miles and not over 150..	48	41	37	33	29	27	27	27	17	13	27	27	34	19	19	14	10	10
150 miles and not over 160..	50	43	38	34	30	28	28	28	17	14	28	28	34	20	20	14	10	10
160 miles and not over 170..	51	44	39	35	32	29	29	29	17	14	29	29	34	20	20	14	11	11
170 miles and not over 180..	53	45	40	36	32	29	29	29	18	14	29	29	36	21	21	15	11	11
180 miles and not over 190..	54	47	41	37	33	30	30	30	18	14	30	30	36	22	22	15	11	11
190 miles and not over 200..	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12	12
200 miles and not over 210..	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12	12
210 miles and not over 220..	59	50	43	39	35	32	32	32	20	15	32	32	40	24	24	17	13	13
220 miles and not over 230..	60	52	44	40	36	33	33	33	20	15	33	33	40	25	25	17	13	13
230 miles and not over 240..	62	53	44	41	37	34	34	34	20	16	34	34	40	26	26	17	14	14
240 miles and not over 250..	63	54	45	41	38	35	35	35	20	16	35	35	40	27	27	17	14	14
250 miles and not over 275..	65	56	46	42	38	35	35	35	21	17	35	35	42	29	29	18	14	14
275 miles and not over 300..	68	58	47	43	39	36	36	36	21	17	36	36	42	29	29	19	15	15
300 miles and not over 325..	70	59	47	44	40	37	37	37	22	17	37	37	44	30	30	20	16	16

Provided, however, that where said defendant, the Illinois Central Railroad Company has in effect a tariff, or tariffs, of rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated "Maximum Rates, Kentucky
50 Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The Commission is further of the opinion that all rates now in effect upon the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway in Kentucky, as shown by their respective tariffs and mileage scale of rates on file in this office, respectively, to-wit: Cincinnati, New Orleans & Texas Pacific Railway Company's Local Mileage Tariff Number 8, effective January 1, 1906, and Southern Railway Company in Kentucky's Local Tariff Number 4, effective February 27, 1905, where the same are in excess of the mileage scale of rates hereinbefore fixed for the defendant, the Louisville & Nashville Railroad Company and herein designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company," are hereby declared to be extortionate, unjust and unreasonable. It is, therefore, Ordered, That said Cincinnati, New Orleans & Texas Pacific Railway Company and said Southern Railway Company in Kentucky be, and they are, hereby forbidden to charge, collect or receive for the transportation of commodities, rates in excess of those herein permitted to be charged by said Louisville & Nashville Railroad Company as shown by said Standard Local Scale of Rates.

Provided, however, That where either of said defendants, the said Cincinnati, New Orleans & Texas Pacific Railway Company or said Southern Railway in Kentucky, now has in effect rates lower than those fixed by said standard scale, said defendants shall not charge, collect or receive rates in excess of said lower rates as now published by said defendants respectively.

In view of the fact that the defendant, the Chesapeake & Ohio Railway Company, uses what is known as the "Official Classification," which is entirely different from the Southern Classification now in use by nearly all of the railroads in the State of Kentucky, and not being able at this time to assimilate said classifications, or to make an accurate comparison thereof, the Commission does not feel warranted at this time in making a mileage scale of rates or a classification for the use of the said Chesapeake & Ohio Railway Company. It is, however, of the opinion, and it is now Ordered, That said Chesapeake & Ohio Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation
51 of commodities, rates in excess of those herein permitted to be charged by the defendant, the Louisville & Nashville Railroad Company, as shown by said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company." Said Chesapeake & Ohio Railway Company may assimilate its classification with that of the

Southern Freight Classification, and exceptions thereto, now in use by said Louisville & Nashville Railroad Company upon the basis heretofore adopted and now in use by said Chesapeake & Ohio Railway Company for such assimilation as shown by its tariffs now on file in this office.

This Commission has not yet adopted a standard classification for any or all of the railroads in the State, and in the absence of such classification, and for the purpose of effectuating this order, it now hereby adopts the Southern Freight Classification now in effect with the current exceptions issued by the various railroads, defendants hereinbefore named, applicable to Kentucky traffic, and the Commission reserves the power to revoke, change or modify this order and to change or modify any or all of said rates, classifications and exceptions thereto, and reserves further the power to make and issue a classification of its own for the use of any or all of said defendants; and it appearing to the Commission from tariffs now on file in this office that many of the commodities assigned to the various classes stated in the Maximum Rates, Kentucky Railroad Commission's Standard Tariff Nos. 1 and 2, herein adopted, are transported by the respective railroads on commodity rates, or rates less than those fixed by said standard tariffs, it is now Ordered, That said commodity or such other rates as are lower than those fixed by said Railroad Commission's Standard Tariffs Numbers 1 and 2, shall remain in effect as maximum rates until otherwise ordered by this board.

All other questions herein are reserved for future determination, and the Commission will, from time to time, make and issue such orders upon all matters herein as may be deemed just and proper.

It is further Ordered, That each of the defendants be furnished with copies of this opinion and order, and copies of said Maximum Rates, Kentucky Railroad Commission's Standard Tariffs Nos. 1 and 2 attested by the Secretary of the Commission.

C. C. McCHORD, *Chairman;*
A. T. SILER,
McD. FERGUSON,
Commissioners.

The foregoing exhibit is endorsed in words and figures as follows, viz: Filed Jul- 25, 1906. W. G. Chapman, Clerk.

52 On the same day, to-wit, on the 25th day of July, A. D., 1906, a Subpœna in Chancery was issued on the foregoing Bill of Complaint, which said Subpœna is in words and figures as follows, viz:

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, sct:

The President of the United States of America, to the Marshal of the Eastern Kentucky District, Greeting:

You are hereby commanded to summon Charles C. McChord, Adam T. Siler, and McDougal Ferguson, constituting the Railroad

Commission of the State of Kentucky, to appear before our Circuit Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Frankfort, on the first Monday in September next, to answer a bill in equity, exhibited against them in our said Court, by Illinois Central Railroad Company and this they shall in nowise omit, under the penalty of four hundred dollars, and have you then there this writ.

In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America, [SEAL.] hath caused the seal of our said Circuit Court to be hereunto affixed, at the Clerk's Office of said Court in Frankfort, this 25th day of July, A. D., 1906, and in the 131st year of our Independence.

Attest:

WALTER G. CHAPMAN, *Clerk.*

53 *Memorandum.*

The said defendants are required to enter their appearance in the Clerk's Office of said Court, on or before the first Monday in September, 1906; otherwise the said Bill may be taken *pro confesso.*

WALTER G. CHAPMAN, *Clerk.*

The Marshal's Return on the foregoing Subpœna is as follows:

Received this Subpœna in Chancery at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to each of the within named defendants at the following times and places, viz.: to McDougal Ferguson, on July 26th, 1906, at Frankfort, Ky.; to Adam T. Siler, on July 27th, 1906, at Williamsburg, Ky.; to Charles C. McChord, on August 17th, 1906, at Frankfort, Ky.

Witness my hand this the 17th day of August, 1906.

S. G. SHARP,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

The Clerk's endorsement on the foregoing Subpœna is as follows: Returned & filed Aug. 22, 1906, W. G. Chapman, Clerk.

On a day following to-wit, on the 26th day of July, A. D., 1906, a restraining order was made and entered in said cause, which said order is in words and figures as follows, viz:

54 ILLINOIS CENTRAL RAILROAD CO.
vs.
CHARLES C. McCHORD ET AL.

The complainant moved the Court to grant to it a preliminary writ of injunction in accordance with the prayer of the bill of complaint, and said motion is now fixed for hearing on the 24th day of September, 1906, at 11 o'clock, A. M., in the Court Room in the City of Frankfort, Kentucky; and it having been made to appear that there

is danger of irreparable injury being caused complainant before the hearing of said application for the writ of injunction, unless the said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be and it is granted, and that the said Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force and effect their order of June 20, 1906, promulgated July 19 or July 20, 1906, reducing the railroad rates of the complainant on intra-state freight between points within the State of Kentucky or putting into force and effect the schedule of maximum rates prepared and promulgated thereunder so far as such rates relate to the railroad of the complainant; and also are restrained and enjoined, individually and jointly as constituting said Railroad Commission, from recommending or causing to be instituted any prosecution by indictment, or other legal proceeding, against the complainant or any of its officers, agents or employés, to recover any fine or penalty imposed by the Act of March 10th, 1900, set out in complainant's bill of complaint, and constituting Section 820-A of Kentucky Statutes, or upon any cause of action or ground whatever, for or on account of complainant's failure
55 or refusal to put into force and effect the Railroad Commission's order aforesaid, or the rates fixed in the schedule of maximum rates prepared thereunder, until the hearing upon the said application for writ of injunction and the further order of the court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of this said motion if they so desire.

Certified copy of said Restraining Order having been placed in the hands of the United States Marshal for the Eastern District of Kentucky for service, the same was returned and filed in the Clerk's Office on August 22nd, 1906, with said Marshal's return thereon as follows, viz:

Received this Restraining Order at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to the within named McDougal Ferguson, at Frankfort, Ky., on July 26th, 1896; and further by delivering a true copy thereof to the within named Adam T. Siler, at Williamsburg, Ky., on July 27th, 1906. Charles C. McChord not found within my District.

Witness my hand this the 27th day of July, 1906.

S. G. SHARP,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

Certified Copy of said Restraining Order having been placed in the hands of the United States Marshal for the Western District of Kentucky for service, the same was returned and filed in the Clerk's Office on July 28th, 1906, with said Marshal's return thereon as follows, viz:

56 Received this Writ at Louisville, Ky., July 26th, 1906, and executed same by delivering a true copy thereof to Charles C. McChord at 8 o'clock P. M., July 26th, 1906, in Louisville, Ky., This July 26th, 1906.

G. W. LONG,
U. S. Marshal for the Western District of Ky.

On a day following, to-wit, on the 3rd day of September, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

ILLINOIS CENTRAL RAILROAD CO.
vs.
CHARLES C. MCCHORD ET AL.

Now come the defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, by their attorney, Bennett H. Young, and enter their appearance in the above styled cause.

On a day following, to-wit, on the 24th day of September, A. D. 1906, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

No. 543.

ILLINOIS CENTRAL RAILROAD CO.
vs.
CHARLES C. MCCHORD ET AL.

This cause came on to be heard on the motion for an injunction *pendente lite* and it is now ordered that the restraining order hereinbefore entered be continued as an interlocutory injunction
57 until the final hearing of the cause, or until the further order of the court herein the defendants not objecting to this order on condition that complainant shall stipulate, and said complainant does now so stipulate as follows:

(1) All way-bills made out by it on and after October 1, 1906, on Kentucky intra-state shipments shall show on their face the date, point of origin, point of destination, consignor and consignee, the character of articles consigned for shipment, weight, rate, freight and total charges.

(2) Such way-bills shall be preserved until the final determination of the cause.

(3) There shall be given to each shipper where he prepays the freight, or to the consignee where he pays the freight, a bill of lading, receipt or expense bill showing the date, point of origin, destination, name of consignor and consignee, character of freight shipped, weight thereof, rate of freight and total amount of freight charges.

(4) The Complainant shall keep all Kentucky intra-state way-bills separate from interstate way-bills and on file in its general offices so separated, to the end that from such way-bills, bills of

lading, receipts or expense bills it may be hereafter determined, if such become necessary or expedient, what amount, if any, was charged to each shipper in excess of a lawful rate. This order, however, is not to prejudice the complainants' right to contest as a matter of law the claim of shippers to recover of it any such excess. And time is given to defendants until November Rules to plead, answer or demur. This order is entered by consent of parties hereto. John W. Ray, Esq., an attorney of this bar, appeared on behalf of
58 the Attorney General of the State and announced that the Attorney General did not consent thereto. The court then announced that it would hear him in regard thereto, but he, not desiring to be heard, the order was entered subject to right of Attorney General, at any time, to move to set it aside on due notice to parties hereto.

On a day following, to-wit, on the 5th day of November, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

ILLINOIS CENTRAL R. R. Co.
vs.
CHAS. C. MCCHORD ET AL.

This day came the defendants, by their solicitors of record, and filed their answer to the bill of complaint herein.

The answer of Defendants to the Bill of Complaint, referred to in the foregoing order, is in words and figures as follows, viz:

59 The Circuit Court of the United States, for the Sixth Circuit and Eastern District of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, MCDOUGAL FERGUSON, and ADAM T. SILER, Railroad Commissioners of Kentucky, Defendants.

Answer.

To the Honorable Judges of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky:

I.

The defendants now and at all times hereinafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as the defendants are advised it is material or necessary for them to make answer to, answering, say:

II.

The defendants, for answer to paragraph 2 of the bill, deny that the complainant's railroads and terminals situate within the State of Kentucky, and used by it in the transaction of domestic or
60 intrastate and interstate business in Kentucky, are of the reasonable and fair value of $26,000,000 but defendants state that the said property is worth greatly less than the amount stated. Defendants deny that complainant's traffic, interstate and intrastate, has cost 71.03 per cent. of the gross receipts from intrastate and interstate traffic, inclusive of taxes assessed against its property, to conduct its traffic over its road. The defendants aver that, at the time the order was made, and now, there was reason to anticipate that the traffic conducted by the complainant would greatly increase, and that it could be handled at less than it has cost heretofore to handle same. Defendants deny that the additional cost of conducting intrastate traffic in Kentucky over the cost of all traffic conducted in said State, both interstate and intrastate, is not less than thirty (30) per cent. of the gross receipts from intrastate traffic, or that it is half that much, or that the amount of intrastate traffic has for at least one year last past been only 23.46 per cent. of the entire traffic in Kentucky. Defendants deny that the complainant has been unable, or is now unable, to earn a fair and just return upon its capital invested in railroad tracks, terminals and equipment engaged in intrastate traffic. They deny that the rates which the complainant has been charging in handling of such traffic have been fair, just and reasonable rates of toll and charges. The defendants aver that, by virtue of the Constitution and laws of Kentucky, to which reference is made in the bill, full and complete power is conferred upon the Railroad Commission to hear and determine what are reasonable rates and tolls for the transportation of products over the various railroads of the State. The defendants aver that
61 they did hear the complaints and investigate the charges made against the railroads, and determine what charges were proper for the said railroads to make for the conduct of intrastate traffic.

III.

For answer to the 3d paragraph of the bill, the defendants deny that the rates of toll and charges made by the complainant had been reasonable, fair and just to the public and persons patronizing the road. The defendants admit J. Ed. Guenther and others complained to the Railroad Commission of certain rates made by the complainant, and alleged that all local freight rates from and to all local points in the State of Kentucky, as fixed and charged by the railroads made defendants to the complaint, on all classes of freight, were excessive, discriminatory and extortionate, and that the local rates of freight as fixed, maintained and charged by the defendants therein were exorbitant, excessive and extortionate; that all of them were discriminatory in favor of some local communities as against other local communities, and that the rates charged and maintained by the railroad companies, including the complainant, were in open

violation of law, against public policy, illegal and extortionate; that the local rates fixed and maintained and charged by the complainant and other railroads throughout the State of Kentucky were not uniform; that they did not treat the local communities with fairness or equitably, but arbitrarily fixed rates and so maintained them as to build up one community, or discriminate against it, at the pleasure of the complainant and the other railroads. Defendants aver
62 that the complainants, including the Commonwealth of Kentucky, asked the Railroad Commission to revise the local rates, not only in and out of the city of Owensboro, but to revise and adjust the rates between all local points, from and to every local point throughout the entire State of Kentucky. The defendants admit the Norman Lumber Company and other dealers in lumber tendered an intervening petition specifying their business, and alleged that all local freight rates from and to all local points in the State of Kentucky, on all commodities, as fixed and charged by the complainant and other railroads, were excessive and extortionate, and that the freight classifications were discriminatory and extortionate, and that the rates and classification on lumber, logs, ties and other timber commodities, to and from all points in Kentucky, were especially extortionate, discriminatory and unreasonable. As we have said, the Commonwealth of Kentucky filed an intervening petition, in which substantially the same charges were made against the complainant and other railroads as were made by Guenther and others and the Norman Lumber Company. The defendants aver that the complainant appeared before the Commission, in answer to these several complaints that had been filed, and made defense thereto; that it had a full and complete hearing, and abundance of time was afforded it to make whatever defense or showing it could make to sustain the rates of toll which it had been charging upon the intrastate traffic conducted over its lines of road. The defendants, as heretofore stated, aver that, under the Constitution and Statutes of Kentucky, the Railroad Commission had the authority to hear and determine the questions raised by the complain-
63 ants which had been filed before it, and to make such orders with reference to future charges for the conduct of intrastate traffic over the various railroads as it deemed proper and just, under the circumstances. They deny that the complainant, before the Commission, did show that it had been receiving on intrastate traffic less than a fair and just return or income. The defendants aver that the complainant had been receiving more than a fair and just return or income for conducting intrastate freight business over its lines of railway in Kentucky.

IV.

For answer to the 4th paragraph of the bill, the defendants deny that no specific rate or rates was investigated by the Commission, or that the tariff of rates promulgated by the Commission in the order was based upon a revision of rates heretofore charged by the Louisville & Nashville Railroad Company, or that the said order was made without investigation or consideration of, or regard for, the special

circumstances or conditions affecting complainant. The defendants aver that, under the circumstances, it was entirely proper for the Commission to order the commodity or such other rates as were lower than those fixed by the Railroad Commission's standard Tariffs Nos. 1 and 2 to remain in effect as maximum rates, until otherwise ordered by the Commission; that the railroads had established and maintained these rates, and that they were no more than just and reasonable, under the circumstances; that the complainant has not increased these commodity rates, or attempted to do so, nor has it made any application to the Commission to have the order changed
64 with reference thereto. The defendants deny that the said commodity rates, or any of them, are lower than similar rates in force upon other roads, competitors of complainant in business. Defendants deny that said commodity rates are confiscatory, or violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, or that they have the effect of depriving the complainant of its property without due process of law.

V.

For answer to the 5th paragraph of the bill, the defendants deny that the receipts from intrastate freight traffic in Kentucky for the fiscal year ending June 30, 1905, were approximately $733,191, or anything like so small an amount. The defendants aver that the indications are that the volume of traffic over the complainant's lines of road will greatly increase. Defendants deny that by reason of the order of the Commission the complainant will receive $49,744 less gross receipts from intrastate business than it received under the rates heretofore in force; and this for the reason that the volume of business over the lines of railroad of the complainant will so increase as to compensate it largely for the reduction in rates; but it is averred that if this does not occur, the order did not reduce the rates of toll below a fair and reasonable compensation for conducting the business in question.

VI.

In answer to the 6th paragraph of the bill, the defendants deny that the railroads against which the order of the Commission
65 is not made to operate, have, and during all the time aforesaid had, in force and effect rates materially higher than those of complainant, and higher than those prescribed in the order to be observed by the railroad companies embraced in the said order. They deny that the charges made by these said roads against which the order is not made operative conduct their business under substantially similar circumstances and conditions to either of the railroad companies named in the order. They deny that the said order is partial, unjust or discriminatory, or is in excess of the power of said Commission, or that the complainant is denied the equal protection of the law. They deny that the complainant has in force, or at all times has had in force, commodity rates or certain class rates considerably lower than the commodity rates or class rates charged by complainant's competitors in the same territory. They deny

that the complainant is prohibited from charging as high commodity rates and certain class rates as its competitors are permitted by the order to charge for the same commodities and classes, as set out in Tariffs Nos. 1 and 2 fixed by the Commission; if there is any difference in the commodity or certain class rates charged by the several roads mentioned in the order, or such as are not mentioned in the order, then it is because the freight is not carried under the same circumstances and conditions.

VII.

For answer to the 7th paragraph of the bill, the defendants deny that the rates which were established and maintained by the complainant before the order of the Commission was made were
66 reasonable and just, or that they only brought a fair and just remuneration for the services rendered in the transportation of intrastate freight, or that the complainant only received for such services a fair and just return upon the capital invested in its railroads and terminal facilities, equipment and other property embarked in the transportation of freight between points in Kentucky. They deny that the commodity rates, or the said certain class rates, are so low as not to yield a fair and just return to the complainant for the services rendered in the transportation of intrastate freight under such rates of toll.

VII.

For answer to the 8th paragraph of the bill, the defendants deny that the Act of March 10, 1900, is in conflict with Article IV, Section 5 of the Constitution of the United States, guaranteeing to every State a republican form of government, or of Sections 27, 28, 109 and 135 of the Constitution of Kentucky, dividing the powers of government into three distinct departments, etc. They deny that the Act of March 10, 1900, is in conflict with Article IV, Section 8, Sub-section 3 of the Constitution of the United States, in assuming to regulate interstate commerce. They deny that the said act is in conflict with Article VIII of the Amendments to said Federal Constitution, and Section 17 of the Bill of Rights of the Constitution of Kentucky, or that the act attempts to impose excessive fines or penalties. They deny that the act is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, or that the act denies to complainant the equal protection of the laws, or that the railroad companies in Kentucky are
67 under the arbitrary power of the Railroad Commission. They deny that the act is invalid for the alleged reason that the act does not provide that the Railroad Commission shall regulate common carriers other than railroads in the State. They deny that the act is invalid because it confers upon the Railroad Commission the right to fix rates of toll or charges for transportation, or that the railroads are deprived of an opportunity for judicial investigation or to make defense in courts as to the reasonableness, justness or fairness of the rates ordered. They deny that they are deprived of the right to have the question determined as to whether the rates are con-

fiscatory in character. They deny that the said act is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, or that it denies to the railroads of the State the right to due process of law, or requires them to submit to the rates fixed by the Railroad Commission, whether fair and just or confiscatory, without an opportunity for judicial determination of the question.

IX.

For answer to the 9th paragraph of the bill, the defendants deny that if the schedule of rates made by the Commission is put in operation it will have the effect of depriving the complainant of its property without due process of law, or that it will be compelled as a common carrier to perform the service of transportation of freight between points in the State of Kentucky without a just and fair remuneration therefor, or for such tolls or charges as would not
68 yield it a fair or just remuneration for the services rendered. They deny that the property of the complainant would be taken for public uses without just compensation.

X.

Defendants deny that their said order and opinion was without authority of law in that, or in any other respect, wherein it was ordered that where complainant has in effect a tariff or tariffs of rates upon commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Commission's Maximum Table of Rates designated "Kentucky Railroad Commission's Standard Tariff No. 2, applicable to the Illinois Central Railroad Co.," complainant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs. Defendants aver that, under the circumstances, it was entirely proper for the Commission to order the commodity, or such other rates as were lower than those fixed by said Railroad Commission's Standard Tariff No. 2, to remain in effect as maximum rates until otherwise ordered by the Commission; that complainant had established and maintained these rates as just and reasonable, and that they were no more than just and reasonable under the circumstances. In addition to its own judgment upon this proposition, the Commission was and is fortified by the complainant's judgment, evidenced by the fact that complainant made and fixed said rates as just and reasonable; that complaint has not increased these commodity or lower rates or attempted to do so, nor has it made any application to the
69 Commission to have the order changed with reference thereto. Defendants deny that said commodity or other rates, or any of them, are lower than similar rates in force upon other roads, competitors of complainant in business. Defendants deny that that portion of their said order as undertakes to prohibit complainant from increasing its existing lower commodity rates from what they are to said Commission's maximum rates on the classes to which such commodities belong is either null or void.

XI.

Defendants say that complainants and all other railroad carriers have heretofore adopted a plan for making rates. In accordance with this plan or basis, the many thousands of articles which they are required to transport, and for the transportation of which rates must be made, are classed or grouped in such a way as to bring them together into one or the other of said classes of groups, in order that each class or group may be subjected to the same charge for carriage. A rate is then fixed for each class or group, this being done to facilitate the making of rates, and is but one of the elements and a part of the plan or basis for making same. As shown in complainant's local freight tariffs and in "Kentucky Railroad Commission's Standard Tariff No. 2, applicable to the Illinois Central Railroad Co.," complainant had, theretofore, adopted classifications or groups, to wit, numbers 1, 2, 3, 4, 5, 6, and letters A, B, C, D, E, H, F, K, L, M, N and O. Under these classifications or groups, about three thousand five hundred (3,500) commodities are distributed, and the rate upon each class or group is then fixed as shown in said tariffs, thereby fixing the rate for the transportation of each
70 commodity assigned to the several classes or groups. Defendants did not change complainant's plant or basis for making such rates, but, upon the contrary, adopted and approved the same as the most convenient form and method of making and fixing said rates, and the plan or basis thus adopted is nothing more nor less than making and fixing the rate. Defendants deny that their power is limited to a case where, upon complaint, or their own motion, after notice and investigation, they find an existing rate is extortionate, they may, in lieu of the particular rate held by them to be extortionate, make, fix and name a rate which they shall determine to be a just and reasonable one for like services thereafter rendered.

XII.

Wherefore, these defendants having fully answered, confessed, traversed and avoided or denied all the matters of said bill of complaint material to be answered, according to their best knowledge and belief, humbly pray this honorable court to enter its decree that the defendants be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as to this honorable court may seem meet, and in accordance with equity.

BENNETT H. YOUNG,
ROBERT H. WINN,
T. H. PAYNTER,
Attorneys for Defendants.

71 The foregoing answer is endorsed in words and figures as follows, viz: Filed at Rules, Nov. 5th, 1906. W. G. Chapman, Clerk.

On a day following, to-wit on the 3rd day of December, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
CHARLES C. MCCHORD ET AL.

This day came the complainant, by its attorneys of record, and filed its replication herein.

Replication, referred to in the foregoing order, is in words and figures as follows, viz:

United States Circuit Court, Sixth Circuit, Eastern District of Kentucky.

543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, MCDOUGAL FERGUSON, and ADAM T. SILER, Railroad Commissioners of Kentucky, Defendants.

Replication.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficieneies of the answer of said defendants, for replication thereunto saith that it doth and will
72 aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of said defendants is uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly pray as in its bill it hath already prayed.

TRABUE, DOOLAN & COX,
Counsel for Repliant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed at Rules, December 3rd, 1906, W. G. Chapman, Clerk.

On a day following, to-wit, on the 27th day of February, A. D., 1907, an order was made and entered in said cause, which order is in words and figures as follows, viz:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
CHARLES C. MCCHORD ET AL.

Now upon this day came the complainant, Edmund F. Trabue and Attilla Cox, Jr., counsel, and the defendants, by Bennett H. Young and Thos. H. Paynter, Counsel; and thereupon it is now ordered by the court as follows:

73 1. Samuel H. Stone, Esq., is hereby appointed Special Master to take such evidence in this cause as may be offered by either of the parties hereto, and make report thereon to the court; and he will take such evidence as may be offered by either of the parties hereto, and report his findings of fact thereon to the court at the earliest reasonable time practicable, together with the evidence in the cause.

2. In taking such evidence the Master is authorized to employ a competent and reliable stenographer, or stenographers, whose compensation shall be fixed by him, to take down the testimony and reduce the same to writing. And said Master shall have power to appoint such place or places, for the taking of the evidence as may be convenient to the parties and witnesses, due notice whereof shall be given to counsel for complainant and defendants.

3. He shall cause such evidence to be transcribed and printed under his supervision, furnishing to the complainant and the defendants copies of same. The expense of printing shall be taxed as costs and abide the result of this action. He shall fix a time in which the complainant shall take its evidence in chief, and the time in which the defendants shall take their evidence in rebuttal, but shall have power to extend the time fixed by him for the taking of evidence by either party for good cause shown.

4. After the evidence offered by the parties shall have been taken the Master shall make a full report to the court of his findings upon the facts, and shall cause the same to be printed and copies thereof delivered to counsel for complainant and defendants.

74 He shall ascertain and find from the evidence introduced the following facts and report them to the court:

(*a*) The original cost of construction of the railroad and properties used by the complainant in the State of Kentucky in the conduct of its business as a common carrier.

(*b*) The amount expended thereon in permanent improvements.

(*c*) The amount, par, and market value of its bonds and stock as of March 1, 1907.

(*d*) The probable present cost of reconstruction and reproduction of the railroad and properties of the complainant, used in its business as a common carrier in the State of Kentucky in the condition in which they now are.

(*e*) The present value, as of March 1, 1907, of the rolling stock and equipment used by complainant in its business as a common carrier in the State of Kentucky.

(*f*) The total value of all the properties operated by the complainant in the State of Kentucky, and the value of such properties

devoted to the conduct of *intrastate* traffic, and the value thereof devoted to the conduct of interstate traffic, respectively, during the year ending June 30, 1905, and the year ending June 30, 1906, and as of March 1, 1907.

(*g*) The gross earnings, per annum, from the operation of complainant's railroads in Kentucky during the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, inclusive; showing, as nearly as practicable, what part of said earnings is from *interstate* commerce, and what part from *intrastate* commerce, stating the amounts derived from *intrastate* and *interstate* freight traffic separately from the amounts derived from other traffic.

75 (*h*) The operating expenses and taxes expended by complainant in Kentucky for the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906 to March 1, 1907, inclusive; showing, as nearly as practicable, what part of said operating expenses and taxes was expended in the conduct of its *interstate* business, and what part of same was expended in the conduct of its *intrastate* business.

(*i*) The earnings which would have accrued to complainant for the year ending June 30, 1905, for the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, if the rates promulgated by the defendants by their order of June 20, 1906, had been in effect during said periods.

5. Said Master shall report such other facts as may be developed in the evidence which are pertinent to the issues in this cause, and at the request of either party shall make a special finding upon any fact deemed material by such party to any issue herein.

6. The Clerk of this court will furnish the said Special Master with a certified copy of this order and, without further order, turn over to him, taking his receipt therefor, all pleadings and court papers pertaining to this cause.

On a day following, to-wit, on the 11th day of March, A. D., 1907, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

76 ILLINOIS CENTRAL R. R. CO.
vs.
CHARLES C. MCCHORD ET AL.

It is ordered that this cause be, and it is hereby, continued until the next regular September Term of the court.

On a day following, to-wit, on the 2nd day of August, A. D., 1907, an order was made and entered in the case of the Louisville & Nashville Railroad Company *vs.* Charles C. McChord *et al.*, which said order applies to this case, and is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. MCCHORD ET AL.

This day came Samuel H. Stone, Special Commissioner appointed by the Court to take proof in the several cases, viz: Southern Railway in Kentucky *vs.* Charles C. McChord, *et al.*, Cincinnati, New Orleans & Texas Pacific Railway Co., *vs.* Charles C. McChord, *et al.*, Illinois Central Railroad Company *vs.* Charles C. McChord, *et al.*, and Louisville & Nashville Railroad Company *vs.* Charles C. McChord, *et al.*, and all parties to said actions, by counsel, appearing before the Court, and it further appearing to the Court that it is necessary that the parties hereto shall make a deposit for the purpose of paying the costs of taking and writing the proof, printing,
77 publishing and all other expenses connected therewith,

It is hereby ordered that all the plaintiffs herein shall pay, together, to Samuel H. Stone, Commissioner, the sum of $1,000. and that the Commonwealth of Kentucky shall pay to Samuel H. Stone, Commissioner, the sum of $1,000.00 said amount to be used in defraying expenses connected with the taking and writing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the court, and all questions as to the taxation of costs are reserved for future orders of the court.

On a day following, to-wit, on the 2nd day of December, A. D., 1907, an order was made and entered in the case of Louisville & Nashville Railroad Co., *et al.*, *vs.* Charles C. McChord, *et al.*, which said order applies to this case, and is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. MCCHORD ET AL.

This day came Samuel H. Stone, Special Commissioner appointed by the Court to take proof in the several cases, viz: Southern Railway Company in Kentucky *vs.* Charles C. McChord, *et al.*; Cincinnati, New Orleans & Texas Pacific Railway Company *vs.* Charles C. McChord *et al.*; Illinois Central Railroad Company *vs.* Charles
78 C. McChord *et al.*; and Louisville & Nashville Railroad Company *vs.* Charles C. McChord *et al.*, and all parties to said actions, by counsel, appearing before the Court, and it further appearing to the court that it is necessary that the parties hereto shall make a further deposit for the purpose of paying the costs of taking and writing the proof, printing, publishing and all other expenses connected therewith.

It is hereby ordered, that all the plaintiffs herein shall pay, together, to Samuel H. Stone, Special Commissioner as aforesaid, the sum of One Thousand ($1,000) Dollars, and that the Commonwealth of Kentucky shall pay to said Samuel H. Stone, Commissioner, the sum of One Thousand ($1,000) Dollars, said amount to

be used in defraying expenses connected with the taking and writing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the Court; and all questions as to the taxation of costs are reserved for future orders of the court.

On a day following, to-wit, on the 9th day of January, A. D., 1908, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
CHARLES C. MCCHORD ET AL.

This day came the complainant, Illinois Central Railroad Company, by Edmund F. Trabue, its counsel, and moved the court to permit said complainant to withdraw its replication and
79 file an amended and supplemental bill herein, and at the same time tendered said amended and supplemental bill, and it appearing to the court that the said bill is material and proper and that the said application is timely and the defendants Adam T. Siler and McDougal Ferguson appearing through their counsel, Chas. C. McChord and Thos. H. Paynter, Robert H. Winn, and the court being advised it is ordered and decreed that the complainant's said motion is sustained and that leave be, and it is given to said complainant to withdraw the said replication and file the said amended and supplemental bill and to refile the said replication after the defendants shall have answered the said bill or declined or failed to answer the same, and it is ordered, adjudged and decreed that a subpœna issue against the defendant Llewellyn P. Tarlton as prayed in the said amended and supplemental bill, and the preliminary injunction heretofore issued is hereby extended to the said Adam T. Siler, McDougal Ferguson and Llewellyn P. Tarlton and each of them, their employés and representatives and all persons acting or claiming to act by, through or under them or any of them to the full extent that said order applied to the original defendants in this suit and their employés and representatives and all persons acting or claiming to act by, through or under them or any of them and upon the same terms and conditions, until the further order of this court. Then came Llewellyn P. Tarlton, in *propria persona*, and entered his appearance hereto, and time is given the defendants until the March Rules 1908 to plead, answer or demur.

80 The Amended Bill of Complaint, referred to in the foregoing order, is in words and figures as follows, viz:

Amended and Supplemental Bill of Complaint.

In the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, in Suit No. 543.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Kentucky, Sitting in Equity, at Frankfort:

Illinois Central Railroad Company, the complainant in this suit, a corporation created by and existing under the laws of the State of Illinois, and a citizen and resident of said State, by leave of the court in that behalf first had and obtained, brings this its amended bill of complaint against the defendants Adam T. Siler, McDougal Ferguson and Llewellyn P. Tarlton, citizens and residents of the State of Kentucky, individually and as members of the Railroad Commission of the Commonwealth of Kentucky, and the Railroad Commission of the Commonwealth of Kentucky composed of said members, and thereupon complainant complains and says:

That heretofore, *to-wit*, on the — day of July, A. D., 1906, complainant duly made and filed its original bill of complaint in this suit against Charles C. McChord, Adam T. Siler and McDou-
81 gal Ferguson, members of the Railroad Commission aforesaid, and against said Railroad Commission composed of said members, to which original bill this is an amendment, and supplement, and to which said original bill complainant begs leave to refer, and complainant hereby repeats all and singular the averments in said bill contained and set forth, and prays that the same may be held and taken as a part of this amendment and supplement in the same manner as if said averments were herein fully and at large set forth, except that said averments of said original bill may be modified by the averments of this amendment and supplement;

And complainant further shows unto Your Honors that on the — day of November, A. D. 1907, the defendant Charles C. McChord tendered his resignation as Railroad Commissioner, and also as Chairman of the Railroad Commission aforesaid to the Governor of the Commonwealth of Kentucky and said resignations were immediately accepted, and that on the — day of December, A. D., 1907, the said Governor appointed and commissioned W. P. Walton as Railroad Commissioner instead of, and to fill out the unexpired term of said McChord as said Commissioner; and that on the 10th day of December, A. D., 1907, Llewellyn P. Tarlton who had been duly elected at the November election A. D., 1907, as Commissioner for the Second Railroad Commission District, being the District wherein the said McChord and Walton had been Commissioners, received his commission as such Commissioner from the Governor aforesaid and duly qualified and took the oath, and thereupon became and has ever since been Railroad Commissioner in lieu and instead of the said Walton, and is now acting as said Commissioner for the said Second Railroad District of Kentucky; and at said November election A. D., 1907, aforesaid Adam T. Siler and McDougal Ferguson were re-elected Railroad Commissioners for the First and

Third Railroad Commission Districts of Kentucky as their
82 own successors respectively and on said 10th day of December, A. D., 1907, duly received from the Governor of Kentucky aforesaid their respective commissions as such Commissioners, and on the 11th day of December, A. D., 1907, the said Commissioners re-organized the said Railroad Commission by the election of the said Adam T. Siler as Chairman and that he has ever since been and now is Chairman of the said Commission; and that said defendants threaten to, and, unless enjoined, will take proceedings to enforce the Railroad Commission's order of June 20, 1906, and July 19, 1906, hereinafter mentioned; and complainant further shows unto Your Honors that in and by paragraph 2 of its original bill of complaint it averred that complainant's railroads and terminals situate wholly within the State of Kentucky and used by complainant in the transaction of purely domestic or intra-state business in Kentucky, and the equipment of said railroads used also in said intra-state business were of the reasonable and fair value of $26,000,000.00 at least, but complainant avers that since the said bill was filed complainant has caused a more careful estimate to be made of the value of its said railroads and equipment referred to as aforesaid and as ascertained, and complainant avers, that it is true, that the said railroads and equipment used by complainant in the transaction of purely domestic or intra-state business in Kentucky are of the reasonable and fair value of at least $28,768,277.77, wherefore by permission of the court the said sum of $28,768,277.77 is now alleged and averred as the value of said railroads and equipment; and complainant further shows unto Your Honors that in and by paragraph 5 of its original bill of complaint it was averred that the income of complainant calculated upon the rates proposed by the Railroad Commission afore-
83 said if enforced would yield to complainant gross receipts from its intra-state freight traffic in Kentucky, carefully estimated and approximated, $49,744.00 less than its gross receipts for the fiscal year ending June 30, 1905 earned at the rates then in force upon complainant's railroad, and would reduce complainant's gross receipts from such traffic nearly seven per cent., and its net receipts therefor several times such amount, if, indeed, any net receipts whatever were realized by complainant; and reduce by necessary and direct operation, complainant's interstate commerce returns more than double $49,744.00, but complainant avers that since the said bill was filed complainant has at an enormous expense of several thousand dollars computed the said loss which would result to complainant by the application of the aforesaid rates promulgated by the said order of the said Railroad Commissioners to complainant's intra-state freight traffic in the State of Kentucky and ascertained, and complainant avers that it is a fact, that complainant's income calculated upon the said rates proposed by the said Commissioners if enforced would yield to complainant gross receipts from said intra-state freight traffic in Kentucky, at least the sum of $46,704.87, June 30, 1905 and $65,680.53 June 30, 1906, less than complainant would receive from said traffic at the rates theretofore and by virtue of the order of this court now in force on

complainant's railroad lines in Kentucky, and that complainant's gross receipts from such traffic would by the application of said rates promulgated by said Commissioners be reduced nearly — per cent., and its net receipts therefrom several times such per cent., if, indeed, any net receipts whatever were realized therefrom by complainant, and by the necessary and direct operation of said rates pro-
84 mulgated by said Commissioners complainant's interstate commerce returns upon traffic transported partly within the State of Kentucky would be reduced by at least the sum of $3,939.60 June 30, 1905, and $4,312.23 June 30, 1906, additional, and complainant says that its averments aforesaid upon this subject in paragraph 5 of its original bill were made through error and mistake and under misapprehension of complainant, and before complainant had time to complete the calculations upon which its computations of the said losses upon intra-state and interstate freight aforesaid have been since made, wherefore complainant corrects the said averments as aforesaid, by permission of this court.

And complainant further shows unto Your Honors that the order made and promulgated by the defendants, as aforesaid, on the 20th day of June, A. D., 1906, and on the 19th day of July, 1896, as is more fully set out and averred in the complainant's original bill aforesaid in paragraph 1 thereof, is in conflict with Article -, Section 8, Sub-section 3 of the Constitution of the United States, in assuming to regulate interstate commerce, the regulation whereof is by said provision of said Constitution confided to the Congress of the United States because said order prescribing the rates of freight to be charged thereafter upon traffic hauled between points in the State of Kentucky would necessarily and inevitably regulate, fix and determine the rates of freight to be charged by complainant and by complainant and other common carriers by railroad transporting freight interstate *i. e.*, between points in the State of Kentucky and points in other states of the United States, and between points in other states over lines passing through the State of Kentucky, and especially between points where the interstate rate or rate for
85 transportation between points in Kentucky and other states is and always has been composed of and consists of the sum of the rate charged by complainant for transportation between points in the State of Kentucky and the rate charged by complainant or some other carrier or of plaintiff and such carrier by railroad from one of the said points in the State of Kentucky or on the boundary line thereof to points in other states, and complainant says that many of said interstate rates are so made, and have for a long time consisted of the sum of the said intra-state and ultrastate rates, and complainant says that the rate charged by complainant for transportation between points in the State of Kentucky cannot be reduced as required by the aforesaid order made by defendants without necessarily and inevitably reducing the said interstate rate to be charged for transportation between the points in the State of Kentucky and points in other states; and complainant further shows that by the last amendment to the Act to regulate commerce, to-wit, the Act approved June 29, 1906, entitled "An Act to amend an Act entitled 'an Act to regulate commerce,' approved February 4, 1887, and all

Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," the Congress of the United States, as far as the power in it lay, exercised the power conferred upon it by Article 1, Section 8, Sub-section 3 aforesaid of the Constitution of the United States to regulate the rates of freight to be charged by common carriers by railroad upon interstate traffic by conferring upon the Interstate Commerce Commission the sole power to fix and regulate rates of freight upon interstate traffic carried on by railroad, and complainant says that the reduction aforesaid of the rates charged by complainant for transportation of freight between points in Kentucky required by the aforesaid order made by defend-
86 ants as aforesaid would necessarily and inevitably work a reduction of the interstate rates to be charged by your petitioner and by your petitioner and other common carriers by railroad for transportation between points in Kentucky and points in other States and between points in different states where the traffic passed through the State of Kentucky whereby the said defendants would necessarily regulate the said interstate rates and invade the province of the Interstate Commerce Commission and the power conferred upon the Congress aforesaid by the Constitution of the United States aforesaid in violation of said Article 1, Section 8, Sub-section 3 of said Constitution and in conflict with said Act of Congress approved June 29, 1906, and prevent the full and proper regulation of commerce among the several states by the Congress of the United States, and the instrumentality provided by said Congress for the regulation of interstate commerce, *to-wit*, the Interstate Commerce Commission, in violation of said Article 1, Section 8, Sub-section 3 of the Constitution of the United States, and their act be null and void and of no effect.

Wherefore, and in consideration whereof, and for as much as complainant is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity where matters of the kind are properly cognizable and relievable, complainant prays that the defendants, Adam T. Siler, McDougal Ferguson and Llewellyn P. Tarlton, individually and as members of duly elected and now composing the Railroad Commission of the State of Kentucky, and may it please Your Honors to grant unto complainant a writ of *subpœna* of the United States of America, issuing out of and under the seal of this Honorable Court directed to the said defendants Siler, Ferguson and Tarlton individually and as members composing the Railroad Commission aforesaid
87 commanding them on a day certain to be named therein and under a certain penalty, to be and appear before this Honorable Court and then and there to answer, but not under oath such oath being expressly waived, all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be made against them in the premises and as shall to Your Honors seem to be meet and agreeable to equity and good conscience; that the temporary injunction heretofore issued in this suit against the defendants to the original bill of complaint and each of them, their employés and representatives and all persons

acting or claiming to act by, through or under them, or any of them agreeably to the prayer of said bill be extended to and include and stand against the aforesaid defendants to this amended and supplemental bill, Siler, Ferguson and Tarlton, until the final decree in this suit, and that upon the hearing of this cause and the entry of a decree therein said temporary injunction may be made perpetual, and complainant prays all the relief against the defendants to this amended and supplemental bill prayed by it in its original bill against the defendants thereto; and may it please Your Honors to grant unto complainant such other and further relief as the circumstances of the case require, and to Your Honors shall seem meet, and complainant, as in duty bound, will ever pray.

TRABUE, DOOLAN & COX,
Counsel for Complainant.
EDMUND F. TRABUE, *Of Counsel.*

STATE OF KENTUCKY, *Jefferson County, set:*

88 I, V. C. Yeager, do hereby certify that on this the 8th day of January, A. D., 1908, personally appeared before me Edmund F. Trabue, personally known to me, who is of counsel for the complainant in this suit, and made oath that the statements contained in the foregoing amended and supplemental bill are true as he verily believes, and that the information upon which the averments of correction of the allegations in the original bill were based was obtained long after the issues in this suit were made up, and that the averments concerning the said matters are supported by the testimony of witnesses who have already testified for complainant before the Master in this suit.

EDMUND F. TRABUE.

Subscribed and sworn to before me by Edmund F. Trabue this the day and date aforesaid. My commission expires February 15, 1908.

[SEAL.] V. C. YEAGER,
Notary Public, Jefferson County, Kentucky.

The foregoing Amended Bill is endorsed in words and figures as follows, viz: Filed Jan. 9, 1908, W. G. Chapman, Clerk.

On a day following, to-wit, on the 2nd day of March, A. D. 1908, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
CHARLES C. McCHORD ET AL.

89 This day came the defendants, Charles C. McChord, A. T. Siler, McDougal Ferguson and L. P. Tarlton, by their attorneys of record, and filed their joint and several plea to the bill of complaint and to the supplemental bill of complaint herein.

The joint and several plea of defendants to amended and supplemental bill of complaint, referred to in the foregoing order, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort. In Equity.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

The joint and several plea of Charles C. McChord, A. T. Siler, McDougal Ferguson, and L. P. Tarlton, to the bill of complaint, and to the supplemental bill of complaint of the Illinois Central Railroad Company, the above-named complainant.

Now come the defendants, A. T. Siler, McDougal Ferguson, C. C. McChord, and L. P. Tarlton, and for plea to the supplemental bill, filed herein at the February, A. D., 1908, rules, and for plea to the original bill herein because of the hereinafter named events which have transpired since the filing of the answer herein, and say:

That in the latter part of November, A. D., 1907, the de-
90 fendant, C. C. McChord, resigned his office as Railroad Commissioner of Kentucky, which resignation was duly accepted; and that he then and thereupon and has ever since ceased to hold said office or to exercise any of the duties thereof.

That on December 10th, A. D., 1907, the terms of office of the defendants, A. T. Siler and McDougal Ferguson, by the Constitutional and statutory laws under which their said offices were created and the terms thereof fixed, expired; and that their commissions of office and all their rights, privileges and duties, which they held and exercised under said commissions and as such officials and railroad commissioners holding under the elections set up in the original bills herein, then ceased and determined; that the terms of office which the last named two defendants now hold under, and the commissions which they now hold as railroad commissioners, and under which they now exercise the functions of said office, are terms of office beginning on December 10th, A. D. 1907, and commissions for said terms awarded them by reason of the fact that at the regular Kentucky State election, held in November, A. D., 1907, they were duly elected railroad commissioners, the said Ferguson for the first district of Kentucky, and the said Siler for the third district of Kentucky, for the term of four years from and after December 10th, A. D. 1908; that they thereupon took the oath of their office, entered upon the discharge of the duties thereof, and are now holding and exercising same by virtue of, and solely by virtue of and under the said election of November 1907, and their commissions thereupon awarded them.

That the Railroad Commission of Kentucky, as composed and constituted at the time of the institution of this action, has,
91 by virtue of said resignation of said McChord, and the said expiration of the terms of office of said Siler and said Fergu-

son, ceased to exist; that this action was and is an action to control, restrain, direct and order, by the compulsory processes of this Honorable Court, the actions of said members of said commission, and that the relief sought by the complainant herein is against and by reason and virtue of an act or acts of the said Siler, McChord and Ferguson as Railroad Commissioners of Kentucky, done by them on or about July 19th, A. D. 1906, and long before the said resignation of the said McChord, and the said expiration of the terms of office and official commissions of the said Siler and the said Ferguson as such railroad commissioners; that the duties, acts, laws, regulations, and facts, out of which this litigation arises, are official duties, acts, laws, regulations, and facts, and are and were incident to and resultant from, and solely incident to and resultant from acts done by, and the fact that the said three defendants constituted and were, the railroad commissioners of Kentucky on said July 19th, A. D. 1906, under terms of office and commissions which have since terminated by resignation and by law, as aforesaid.

That the defendant, L. P. Tarlton, was, by a majority of the duly qualified and voting electors, who voted at the regular 1907 election in and for the State of Kentucky, and the second Railroad Commission District thereof, at said election duly chosen as Railroad Commissioner of Kentucky for said second district; that he thereupon took the oath of his said office, entered upon the discharge of the duties thereof, and is still so acting; that said office is the same office

92 which was held by the defendant C. C. McChord at the time of the institution of this action, and up and until his aforesaid resignation; that the said Tarlton had and took no part in the acts complained of in the original bill herein nor has he ever threatened or endeavored to issue any of the rate orders, or to set on foot any of the prosecutions, or to do any of the things, or to participate in the doing thereof, complained of and sought to be enjoined herein; that neither the said Siler, nor the said Ferguson, nor the said McChord, nor the said Tarlton has ever consented, nor does either or any of them now consent that the said Tarlton may be substituted as, or made a party defendant herein.

That by virtue and by reason of the foregoing set out facts, this action has abated, and now stands abated as to each and all of the defendants herein named, and that same cannot be maintained longer against them or either or any of them.

All of which matters and things these defendants aver to be true, and they plead the said abatement to the bill and supplemental bill, and to each of them, upon which abatement and the said facts, matters and things in support thereof, they pray the judgment of this Honorable Court, and as to whether this cause may further proceed; and they pray to be dismissed hence with their costs.

BENNETT H. YOUNG,
THOS. H. PAYNTER,
CHAS. C. McCHORD,
ROBT. H. WINN,
Counsel for Defendants.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

ROBT. H. WINN,
Of Counsel for Defendants.

93 STATE OF KENTUCKY,
County of Franklin:

A. T. Siler being duly sworn, deposes and says that he is one of the above-named defendants; that the foregoing plea is true in point of fact, and is not interposed for delay.

A. T. SILER.

Subscribed and sworn to before me this 11″ day of February, A. D., 1908. My notarial commission will expire 24 Jany. 1910.
Given under my hand and seal of office.

[SEAL.] CHAS. G. MUTZENBERG,
Notary Public, Franklin County, Ky.

The foregoing plea is endorsed in words and figures as follows, viz: Filed at Rules Mar. 2, 1908, W. G. Chapman, Clerk.

On a day following, to-wit, on the 9th day of March, A. D., 1908, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

ILLINOIS CENTRAL RY. CO.
vs.
CHARLES C. MCCHORD ET AL.

This day came and now comes the Complainant, the Illinois Central Railway Company, and sets down for argument the plea in abatement of the defendants, filed herein as of February 1908, Rule Day.
The Complainants, upon notice to defendants, having set down the plea of defendants filed at March Rules, 1908, for argument,
94 and said plea coming on for argument and having been argued by counsel for complainant and defendants, the same was overruled by the court, to which ruling the defendants excepted and they have ten days in which to answer.

On a day following, to-wit, on the 18th day of March, A. D., 1908, defendants filed their answer to the supplemental bill, which said answer is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

ILLINOIS CENTRAL RAILROAD CO., Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

Answer to Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Kentucky.

The defendants, Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, respectively, now and at all times saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the errors, uncertainties and imperfections in complainant's supplemental bill contained, for answer thereto, or so much thereof as they are advised it is material or necessary for them to make answer to, jointly and severally answering, say:

Defendants admit the resignation of Charles C. McChord,
95 the appointment of W. P. Walton, the election of defendants Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, and that each of them was duly qualified and that said defendant Siler was selected as Chairman of the Commission, all in the manner and on the dates set forth in said supplemental bill.

Further answering, defendants adopt, reiterate and affirm each and all of the statements and allegations set forth in the original answer herein as particularly as if the same were again here repeated, reiterated and set forth in full.

Defendants deny that they or any of them, either individually or as constituting said commission, have threatened to enforce The Railroad Commission's orders or any of them complained of herein.

Defendants deny that complainant's railroads and terminals situate wholly within the State of Kentucky and used by it in the transaction of purely domestic or intra-state business in Kentucky, and the equipment of said railroads used also in said intra-state business, either or both, are of the reasonable or fair, or other value of at least $28,768,277.77. Defendants deny that complainant's income calculated upon the rates proposed by the Railroad Commission, if enforced would yield to complainant gross receipts from its intra-state freight traffic in Kentucky, carefully or otherwise estimated, or approximated, at least, or otherwise, the sum of $46,704.87 June 30, 1905, or $65,680.53 June 30, 1906, less than complainant would receive from said traffic at the rates theretofore and by virtue of the order of this court, or otherwise, now in force on complainant's railroad lines in Kentucky. Defendants deny that the rates promulgated by said commission would reduce complainant's gross receipts
from such traffic nearly ——, or any other per cent., or its
96 net receipts several or any other times such per cent., or any per cent. or amount. Defendants deny that the enforcement

of said order would reduce complainant's gross or net receipts by any sum or amount. Defendants deny that by the necessary, or direct, or other operation of said rates promulgated by said commission, complainant's interstate commerce returns upon traffic transported partly within the State of Kentucky would be reduced by at least the sum of $3,939.60 June 30, 1905, or $4,312.23 June 30, 1906, or by any other sum. Defendants deny that complainant has, at enormous expense of several thousand dollars, or at any other expense, or at all, made any computation by which it can be fairly shown that such a loss would result to complainant by reason of the application of the rates so made by said commission. Defendants deny that the order made and promulgated by defendants or either of them, on the 20th day of June, A. D., 1906, or on the 19th day of July, 1906, as more fully set out and averred in complainant's original bill, in paragraph 1 thereof, or elsewhere, is in conflict with Article 1, Section 8, subsection 3 of the Constitution of the United States in assuming to regulate interstate commerce, the regulation whereof is, by said provision of said Constitution, confided to the Congress of the United States. They deny that said order undertakes to or does regulate interstate commerce; they deny that said order prescribing the rates of freight to be charged thereafter upon traffic wholly between points in the State of Kentucky would necessarily or inevitably regulate, fix or determine the rates of freight to be charged by complainant or by complainant or other common carriers by railroad transporting freight interstate, *i. e.* between points in the State of Kentucky, and points in other States of the United States or between points
97 in other States over the lines passing through the State of Kentucky, or especially or otherwise between points where the interstate rate or rate for transportation between points in Kentucky or other States is or always has been composed of or consists of the sum of the rate charged by complainant for transportation between points in the State of Kentucky or the rate charged by complainant or some other carrier or of complainant and such carrier by railroad from one of the said points in the State of Kentucky or on the boundary line thereof to points in other States. Defendants deny that many of said interstate rates are so made or have for a long time consisted of the sum of the said intra-state and ultra-state rates. Defendants deny that the rates charged by complainant for transportation between points in the State of Kentucky cannot be reduced as required by the aforesaid order made by defendants without necessarily or inevitably reducing the said interstate rates to be charged for transportation between the points in the State of Kentucky and points in other states.

Defendants admit that the Congress of the United States conferred upon the Interstate Commerce Commission as it had the right to do, the power to regulate the rates of freight to be charged by common carriers by railroad upon interstate traffic by an Act entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce Approved February 4, 1887, and Acts Amendatory thereof and Supplementary thereto."

Defendants deny that the reduction in complainant's rates pre-

scribed by defendants' order for transportation of freight between points in Kentucky would necessarily or inevitably or otherwise work a reduction of the interstate rates to be charged by
98 complainant or by complainant and other common carriers by railroad for transportation between points in Kentucky and points in other States, or between points in different States where the traffic passed through the State of Kentucky, and defendants further deny that they would thereby necessarily or at all, regulate the said interstate rates or invade the province of the Interstate Commerce Commission and the power conferred upon the Congress aforesaid by the Constitution of the United States aforesaid in violation of Article 1, Section 8, sub-section 3, or of any other Article, section or sub-section of said Constitution or in conflict with said Act of Congress approved June 29, 1906, or any other act of Congress or prevent the full or proper regulation of commerce among the several States by the Congress of the United States or the instrumentality provided by the said Congress for the regulation of interstate commerce, to-wit: The Interstate Commerce Commission, in violation of said Article 1, section 8, sub-section 3, of the Constitution of the United States or of any other Article, section or sub-section of said Constitution. Defendants deny that the act of said commission or the act of either of these defendants with reference to said order is, was, or will be either null, void, or of no effect. Defendants deny that said order of said commission either regulates, or was intended to regulate or can regulate interstate commerce.

Defendants say that the Commonwealth of Kentucky in the exercise of its sovereign power as a State and pursuant to its Constitution through the legislative department of its government did vest in said Railroad Commission the power to fix, and regulate intrastate freight rates as exercised by the promulgation of said order of said commission, and said commission in making said order did not transcend the power and authority thus vested in it by
99 the Constitution of the Commonwealth of Kentucky and by the Legislature of said Commonwealth.

Wherefore defendants pray as in their original answer and that they have such further and other relief in the premises as to this honorable court may seem meet and in accordance with equity.

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing answer is endorsed in words and figures as follows, viz: Filed Mar. 18, 1908, Chas. N. Wiard, Clerk.

On a day following, to-wit, on the 6th day of April, A. D., 1908, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

ILLINOIS CENTRAL RAILROAD CO.
vs.
CHARLES C. MCCHORD ET AL.

This day came the complainant by Trabue, Doolan & Cox, its attorneys, and filed its replication to the answer to the Supplemental Bill herein.

Replication, referred to in the foregoing order, is in words and figures as follows, viz:

100 United States Circuit Court, Sixth Circuit, Eastern District of Kentucky.

No. 543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

Replication to Answer to Supplemental Bill.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the aforesaid answer of the defendants, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the said answer of said defendants is uncertain, evasive and insufficient in law to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in its bill it hath already prayed.

TRABUE, DOOLAN & COX,
Counsel for Repliant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed at Rules, Apr. 6, 1908, Chas. N. Wiard, Clerk.

101 On the 10th day of July, A. D., 1908, pursuant to an order of court, Complainant filed its Amended Bill in said cause, which Amended Bill is in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Amended Bill.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The Complainant, Illinois Central Railroad Company, by leave of court amends paragraph 6 of its original bill of complaint herein by adding thereto the following averments, to-wit:

"Complainant further avers that the Railroad Commission of Kentucky, as its order promulgated July 20, 1906, and herein complained of shows on its face, made and applied its schedule of maximum freight rates styled "Kentucky Railroad Commission's Standard Tariff No. 2 applicable to the Illinois Central Railroad Company," to complainant and to no other railroad company operating a railroad in the State of Kentucky and made and applied its schedule of maximum freight rates styled "Kentucky Railroad Commission Standard Tariff No. 1," to the Louisville & Nashville Railroad Company, Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky and the Nashville, Chattanooga & St. Louis Railway Company and no other, although there were then, and for a long time had been, and ever since have been and now are within the jurisdiction of the State of Kentucky, and engaged in the same business in said State as
102 the complainant was engaged, that is to say, as common carriers of intra-state freight and interstate freight and passengers, operating mileage in said State as follows, to-wit: The Chesapeake & Ohio Railway Company, operating 424.87 miles; the Louisville, Henderson & St. Louis Railway Company, 165.20 miles; the Louisville & Atlantic Railroad Company, 101.10 miles; the Lexington & Eastern Railway Company, 92.54 miles; the Mobile & Ohio Railway Company, 39.69 miles; and many other railroad companies owning and operating then and ever since, and now railways respectively in said State of shorter mileage, all of which Companies were made defendants to the complaints filed in the proceedings before the said Commission which culminated in the same order aforesaid promulgated June 20, 1906.

Complainant further avers that said Commission in said order declared that the Chesapeake & Ohio Railway Company was forbidden to charge, collect or receive for transportation of commodities rates in excess of those permitted to be charged by the Louisville & Nashville Railroad Company as shown in said Standard Tariff No. 1, but said Commission refrained, and has always refrained from mailing to any officer, agent or employé of said Chesapeake & Ohio

Railway Company a copy of said order, and from putting or attempting to put the said order into force and effect as to the said Company and said order has never been made effective as to said Company or been observed by the said Company.

Complainant avers that the said Railroad Commissioners by their said order, arbitrarily and without authority undertook to classify the said Railroad Companies as to which it promulgated said Standard Tariff No. 1, and to prescribe a tariff for complainant alone, thereby classifying it separately from any other Company,
103 and to prescribe a schedule of maximum freight rates for the observance and to be observed by complainant while neither the said Commissioners nor the Legislature of said State have ever prescribed any schedule whatever of maximum freight rates for or to be observed by said other above mentioned Railroad Companies, or either of them, then and now owning and operating their lines of railroad in said State although they were then, have been ever since, and now are engaged in the same business in which complainant and said Railroad Companies to which said Standard Tariff No. 1 was by said Railroad Commissioners made applicable were then and are now engaged, to-wit, the carrying of intrastate freight and interstate freight on their railroad lines within the State of Kentucky; and said Railroad Commissioners have thus permitted said other Railroad Companies at all times to operate their said lines of railroad and conduct their said business in said State without any schedule of maximum rates having been prescribed for them, and permitted them to charge, collect and receive higher rates than those prescribed as the maximum rates for complainant on the same classes of intrastate freight and commodities, for the same distances, or such freight rates as such other railroad companies might or may deem reasonable, over their lines in Kentucky, with liberty to change the same at pleasure; and complainant says that said arbitrary and unlawful classification of said Railroad Companies covered by said Standard Tariff No. 1, and of complainant, and the prescribing of maximum intrastate freight rates for them and not for all Railroad Companies doing the same kind of business in Kentucky was, and is a direct and unfair discrimination against complainant in favor of such other Companies and amounts to a denial by the State of Kentucky and said Railroad Commissioners who formed
104 one of the instrumentalities provided by the Commonwealth of Kentucky under its Constitution and laws clothed with the powers of said State and acting for and in its behalf) to complainant of the equal protection of the laws in violation of the provisions of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, complainant prays as in its original bill of complaint and for all further and general relief to which in equity it may appear entitled.

ILLINOIS CENTRAL RAILROAD COMPANY.
By EDWARD F. TRABUE, *Counsel.*

The foregoing amended bill [illegible] endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants filed their answer to complainant's amended bill, which said answer is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, ET AL., Defendants.

Answer.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

105 The defendants, Adam T. Siler, McD. Ferguson and L. P. Tarlton, for answer to so much of complainant's amended bill as they are advised it is necessary for them to answer, say:

They admit that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 1," was made applicable to the complainant, the Louisville & Nashville Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky, and the Nashville, Chattanooga & St. Louis Railway Company, and that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 2," was made applicable to the Illinois Central Railroad Company. Defendants admit that neither of said tariffs was made applicable to the other railroads named by complainant except said Standard Tariff Number 1 was made applicable to the Chesapeake & Ohio Railway Company, and that no notice of said tariff has ever been served upon said latter Company.

Defendants deny that said Commission either arbitrarily or without authority of law undertook to classify complainant with said three other companies or without such authority to prescribe a Schedule of Maximum Freight Rates for its observance. Defendants admit that the Legislature has never prescribed any Schedule of Maximum Freight Rates for complainant or the other railroads named, nor has this Commission prescribed any such maximum schedule other than as shown by its order of July 20, 1905. Defendants admit that said other railroads are engaged in the carrying of intra-state freight on their lines within the State of Kentucky. They deny that either of said railroads is permitted to or that they do receive higher rates than those prescribed as the maximum
106 rates for complainant on the same classes of intra-state freight or commodities for the same or any distances or that such companies are permitted to charge such freight rates as they

might or may deem reasonable over their several lines in Kentucky. Defendants say that the circumstances and conditions as regards the business of conducting transportation in the State of Kentucky by said other railroads are entirely dissimilar to that of complainants and there is no similarity with respect to the original cost of construction, the present valuation, the capitalization, the volume of business, the earnings or operating expenses, the financial condition or general conditions with respect to conducting transportation by either of said companies to that of complainant and for this reason defendants did not make said schedule of Maximum Freight Rates applicable to either of said other railroads, and for the further reason that the rates upon said other railroads except in a very few minor instances were not higher than the Schedule of Maximum Freight Rates so made by these defendants. Defendants deny that they have made any unlawful classification of said railroad companies or that they have prescribed or that they made any arbitrary or unlawful maximum intra-state freight rates for complainant or either of said railroad companies doing the same kind of business in Kentucky. They deny that their said order was or is a positive or other direct, unfair or other discrimination against complainant in favor of such other companies, and they deny that the same amounts to a denial by the State of Kentucky and said Railroad Commission to complainant of the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, or any other
107 section, or any other provision or section of said Constitution.

Wherefore, having fully answered defendants pray as in their original answer and for all relief to which they in equity may appear to be entitled.

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG, &
C. C. McCHORD,
Attorneys for Defendants.

The foregoing answer is endorsed in words and figures as follows, viz: Filed July 10, 1908. Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, complainant filed its replication to defendants' answer, which replication is in words and figures as follows, viz:

United States Circuit Court, Sixth Circuit, Eastern District of Kentucky.

No. 543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant
vs.
CHARLES C. McCHORD, McDOUGAL FERGUSON, and ADAM T. SILER, Railroad Commissioners of Kentucky, Defendants.

Replication.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to
108 the manifold errors, uncertainties and insufficiencies of the answer of said defendants, to complainant's amended bill filed on the — day of June, 1908, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of said defendants is uncertain, evasive and insufficient in law to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in its bill it hath already prayed.

EDMUND F. TRABUE,
JOHN C. DOOLAN,
ATTILLA COX, JR.,
Counsel for Complainant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed July 10, 1908. Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following stipulation was filed in said cause, viz:

Circuit Court of the United States, Eastern District of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Stipulation.

109 It is hereby stipulated by complainant and defendants as follows:

With the view of saving time and expense incident to taking proof in this case, if it shall turn out that there are grounds upon which

the case can be decided without such evidence, complainant is to make a motion to instruct the Special Commissioner to report that the order of July 20, 1906, is void, basing such motion on such grounds as may be assigned in writing, and on the face of the pleadings in this cause, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky pending the inquiry which led to the order of July 20, 1906. Defendants are to objects to the said motion and urge any ground of objection that seems to them fit, except as to the manner of raising the questions involved; which is waived; but defendants' counsel are to have reasonable notice of the time and place fixed for the hearing of such motion, unless the same shall be agreed upon between counsel for complainant and defendants. The making of this motion is not to be construed as a waiver of any other ground of relief which complainant has asserted in its bill, and especially is not to be considered as a waiver of the ground asserted in the bill that the rates fixed by the order are unreasonable and confiscatory.

If the said motion is decided in favor of complainant and any decree based thereon is reversed upon appeal, such reversal is not to prejudice the right of the complainant to urge such other grounds of relief as are above stated. Pending said motion and any appeal from any order or decree based thereon, the further taking of proof before the Special Commissioner is to be suspended.

110 Each party is to aid the other in a speedy determination of said motion, and the speedy determination of any appeal which may be taken consequent upon the action of the Circuit Court thereon.

Nothing herein is to be deemed a waiver by the defendants of their right to make any objection they may wish to make to the jurisdiction of the court of this action.

TRABUE, DOOLAN & COX,
For Illinois Central Railroad Company.

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following stipulation was filed in said cause, viz:

United States Circuit Court, Sixth Circuit, Eastern District of Kentucky.

#543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

Stipulation.

It is hereby further stipulated by complainant and defend-
111 ants as follows:

The following copies, together with those filed as exhibits with the answer of defendants to the complaint of the Louisville & Nashville Railroad Company in case No. 542 in this court, are true and correct copies of all complaints, pleadings, motions and demurrers filed before the Railroad Commission of Kentucky pending the inquiry which culminated in the order of the said Railroad Commission of July 20, 1906, *to-wit:*

J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Co.

The defendant, the Louisville & Nashville Railroad Company, moves the commission to require the plaintiffs, J. E. Guenther, *et al.*, to elect which of the alleged causes of action improperly joined herein, and set forth in their amended petition, they will prosecute; and also to elect which one of the different defendants herein against which they will prosecute their complaint; and, upon their refusal so to elect, the defendant moves the Commission to strike out of said amended petition all matters and statements concerning any alleged cause or causes of action against this defendant joined with alleged cause or causes of action against the other defendants herein. And further moves the Commission that the complaint against it and its defense thereto may be heard separately and apart from the complaint against any other defendant herein.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

112 J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

The defendant, the Louisville & Nashville Railroad Company, moves the Commission to strike from Paragraph 1 of the amended complaint herein the word "discriminatory," and to strike from Paragraph 2 all of that part of said paragraph which claims that any or all of the rates of this defendant discriminate in favor of some local communities as against other local communities, and all of that part of Paragraph 3 of said amended complaint as alleges that the local rates fixed, maintained, and charged by the defendant are not uniform and discriminate against any community, for the reason that this Commission has no jurisdiction in said matters.

T. B. HARRISON, JR.,
H. L. STONE,
Counsel for Defendant Louisville & Nashville Railroad Co.

J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

The defendant, the Louisville & Nashville Railroad Company, moves the Commission to require the plaintiffs, J. E. Guenther *et al.*,
113 to make more definite and specific the amended petition filed herein by said plaintiffs, and to file a bill of particulars herein; and to specify what local freight rates, and from and to what points, and on what commodities, as fixed and charged by the defendant, are excessive, discriminatory and extortionate; and what rates of freight as fixed, maintained, and charged by this defendant are exorbitant, excessive, and extortionate; and what rates, if any, discriminate in favor of some local community as against other local communities, and the name of the community discriminated in favor of, as well as the community discriminated against; and what rates, and on what commodities, and between what points in this state the rates charged and maintained by the defendant are in open violation of law and against public policy, illegal and extortionate; and it further moves the Commission to require the plaintiffs to specify wherein the local rates as fixed, maintained, and charged by this defendant in Kentucky are not uniform and do not treat all local communities with fairness or equitably, and to specify the name of each local community which is not treated with fairness or equitably and to specify what rates are arbitrarily fixed or maintained so as to build up a community or discriminate against it, and to state the community or communities which it is alleged this de-

fendant has built up or builds up, as well as the community or communities this defendant has discriminated or discriminates against in this State.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

114 J. E. GUENTHER ET AL., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

This day came the defendant, the Louisville & Nashville Railroad Company, and moved the Commission to strike from its file the intervening petition filed herein by the Norman Lumber Company, Louisville Veneer Mills, and Calloway Lumber Company, because the same was filed without authority of law, and the parties filing said intervening petition are not either necessary or proper parties complainant in this proceeding.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

The defendant, the Louisville & Nashville Railroad Company, moves the Commission to strike from Paragraph 1 and Paragraph 2 of the intervening petition of the Norman Lumber Company *et al.*, all of that part of said paragraphs which refer to classification of lumber, log ties and all timber commodities, for the reason that the Commission has no jurisdiction over classifications.

115 The defendant further moves the Commission to strike from said intervening petition Paragraph 5 thereof, for the reason that said paragraph treats of matters over which this Commission has no jurisdiction.

The defendant further moves the Commission to strike from the prayer of said intervening petition the language "that all rates on all commodities in Kentucky be reviewed and revised", for the reason that said complainants have no interest whatever in any rates on any commodities, except lumber, logs, ties and timber commodities.

T. B. HARRISON, JR.,
H. L. STONE,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

This day came the defendant Louisville & Nashville Railroad Co. and moved the Commission to strike from its files the intervening petition of the Commonwealth of Kentucky herein, because the same was filed without authority of law, and the Commonwealth of Kentucky is neither a necessary nor proper party complainant in this proceeding, concerning the rates charged or collected by this defendant for the transportation of articles of freight on its lines in the State of Kentucky.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

116 J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Co.

This day came defendant Louisville & Nashville Railroad Co. and moved the Commission for a rule against the Commonwealth of Kentucky to elect which of the alleged causes of action improperly joined herein and set forth in its intervening petition it will prosecute, and further to elect which one of the several defendants herein against which it will prosecute its complaint herein, and, upon its refusal to so elect, to strike out of its intervening petition all matters and statements concerning any alleged cause or causes of action against this defendant improperly joined with the alleged cause or causes of action against the other defendants herein.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Motion of Louisville & Nashville Railroad Co.

This day came the defendant Louisville & Nashville Railroad Co. and moved the Commission for a rule against the Commonwealth of Kentucky to show cause, if any it has, or can, why it shall not

file a bill of particulars, and to make its intervening pe-
117 tition more definite and certain; and specify what rates and on what commodities or articles of freight and between what points on the lines of this Company in this State are claimed by it to be exorbitant, excessive or extortionate; or what community or communities the rates of this defendant discriminate against, or what rates and on what commodities and between what points on the lines of this Company in this State its rates are in violation of law or against public policy, or are illegal or extortionate or are not uniform, or wherein this defendant does not treat each local community with fairness or equitably, or what rates are arbitrarily fixed or maintained so as to build up a community or discriminate against another or others, and to state the community or communities which it is alleged this defendant has built up or builds up, as well as the community or communities this defendant has discriminated or discriminates against in this State, and what rates and on what commodities and between what points on its lines in this State this defendant has been making or giving undue or unreasonable preference or advantage, and upon what descriptions of traffic in the transportation of like traffic, and what persons, companies, firms or corporations in this Commonwealth, and in what localities or lines of traffic, this defendant has subjected to undue or unreasonable rates to the alleged prejudice or disadvantage of such persons, companies, firms, corporations or localities.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

118 J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Special Demurrer.

The defendant Louisville & Nashville Railroad Co. specially demurs to the intervening petition of the Commonwealth of Kentucky filed herein because it shows

(1) That this Commission has no jurisdiction of this defendant upon said intervening petition or of the subject of the action therein stated.

(2) That the Commonwealth of Kentucky has not legal capacity to sue or prosecute its complaint herein before this Commission?

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

General Demurrer.

The defendant Louisville & Nashville Railroad Co. demurs to the intervening petition of the Commonwealth of Kentucky herein because it does not state facts sufficient to constitute a cause of action against this defendant, nor does it state facts sufficient to support a cause of action or complaint in behalf of the Commonwealth of Kentucky against this defendant.

H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

119 J. E. GUENTHER ET AL., Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO. ET AL., Defendants.

Motion of Defendant Louisville & Nashville Railroad Company.

This day came the defendant Louisville & Nashville Railroad Co. and moved the Commission to strike from so much of paragraph first of the intervening petition of the Commonwealth, filed herein, as alleges that a large proportion of the rates charged by the defendants discriminates in favor of some local communities as against other local communities, for the reason that this Commission has no jurisdiction as to said alleged discrimination.

The defendant further moves the Commission to strike from the said intervening petition of the Commonwealth all that part of the second paragraph of said intervening petition in words as follows:

"The Commonwealth of Kentucky further alleges that the defendants herein have been making and giving undue and unreasonable preference and advantage to persons and localities and to particular descriptions of traffic in the transportation of a like kind of traffic, and have been subjecting a large number of persons in this Commonwealth, and a large number of companies, firms and corporations in localities in particular lines of traffic to such rates as are undue, unreasonable and to the prejudice and disadvantage of such persons, companies, firms and localities",

for the reason that this Commonwealth has no jurisdiction over the matters complained of in the language quoted.

120 H. L. STONE,
T. B. HARRISON, JR.,
Counsel for Defendant Louisville & Nashville Railroad Company.

It is further stipulated that all the motions and demurrers interposed by the said complainant, Illinois Central Railroad Company,

were overruled before it filed its answer to the complaints, or any of them, and that by its answer the complainant traversed all the material allegations of all the complaints.

TRABUE, DOOLAN & COX,
Counsel for Complainant
R. H. WINN,
B. H. YOUNG,
T. H. PAYNTER, &
C. C. McCHORD,
Counsel for Def'ts.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, complainant filed a motion in said cause, which said motion is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

#543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER, and Others, Railroad Commissioners, Defendants.

Motion.

121 This day came complainant, and without waiving any other grounds for relief herein or any other right to a final decree restraining and enjoining the enforcement of the order of the defendants complained of, moves the court, on the face of the pleadings to instruct and direct the Special Master herein to report that the order of said defendants, assuming to establish "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 2 applicable to the Illinois Central Railroad Co." made June 20, 1906, and promulgated July 20, 1906, herein complained of, is void upon the following grounds, to-wit:

1. The Act under which the Commission assumed to Act, approved March 10, 1900, being Section 820—A Kentucky Statutes, undertakes to vest in said Commission, an administrative body, legislative, executive and judicial powers in violation of Article IV, Section 4 of the Constitution of the United States and of Sections 27, 28, 109 and 135 of the Constitution of Kentucky and is, therefore, unconstitutional and void.

2. Neither the said Statute nor any other Statute of the State of Kentucky provides for an appeal to a court from a final order of said Commission, nor for any judicial investigation or judicial review of the question of the reasonableness of any rate fixed by said Commission for services of a carrier thereafter to be rendered before

the carrier is required to put said rate into force and effect, but said Statute makes such order conclusive and final as to the sufficiency of the rate thus fixed, and the carrier is thus deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

122 3. Said Statute imposes so enormous fines as a result of an unsuccessful effort to test the validity of the Statute, or of any final order of the said Railroad Commission fixing a rate for the services of a carrier to be thereafter rendered as to render said Act, on its face, violative of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting any States depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

4. The said Act is unconstitutional and void because it undertakes to vest in said Commission, a non judicial body, the judicial power of adjudging a carrier guilty of extortion for charging, collecting or receiving an existing rate; and because it undertakes to vest in such Commission the power of so adjudging the carrier guilty of extortion as a jurisdictional fact to be first ascertained before fixing a rate which such carrier may charge, collect or receive for like services thereafter rendered without affording the carrier thus convicted an opportunity to be heard in any court on the question of its guilt or innocence of the offense of extortion, or on the question of the reasonableness or sufficiency of the rate thus fixed after such conviction for like services thereafter rendered, whereby the carrier is deprived of its property without due process of law and denied the equal protection of the laws guaranteed by the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Neither under the title nor the provisions contained in the body of the said Act is the Commission authorized or empowered to prescribe or establish schedules of maximum rates or tariffs for the services of railroad carriers as the Commission attempted

123 to do by the order promulgated July 20, 1906, aforesaid:

6. The allegations of the complaints on which the order complained of herein was made and promulgated by the Commission were insufficient to give jurisdiction to, or authorize the Commission to make said order, or to prescribe or establish the maximum rates or standard tariff for all of complainant's lines, between the stations, for all distances, on all classes of freight in the State of Kentucky even if said Act empowered said Commission to establish or prescribe such maximum rates or tariffs upon complaints of any character or under any circumstances.

7. Said Commission, without assuming or professing to condemn or declare extortionate any of such rates undertook by its said order of June 20, 1906, to forbid complainant's charging, collecting or receiving rates in excess of those embraced in any of its commodity tariffs, or other tariffs which were or are less in some instances and in others not greater for the same distances than those shown in

said Commission's "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 2 applicable to the Illinois Central Railroad Co." whereby said Commission attempted to prohibit the complainant's increasing or advancing any rate or rates it had or has in force or effect on any commodity or commodities, and certain other rates, belonging to either of the classes set out in said so-called "Standard Tariff No 2" notwithstanding the fact that such commodity rate or rates, and such other rates, had not only not been found by said Commission to be extortionate, but had been found by said Commission to be less than it was reasonable and proper for said complainant to charge for like services, and had thereby been determined by said Commission not to be extortionate.

124 8. The said Act is in conflict with Article 1 Section 8, Sub-section 3 of the Constitution of the United States in assuming to regulate commerce among the several states, the regulation whereof is by said Constitution confided to Congress; and, also is in conflict with Article VIII of the amendments to said Federal Constitution, and with Section 17 of the Bill of Rights of the Constitution of Kentucky in assuming to impose and providing for the imposition of excessive fines and penalties.

9. The said Act infringes Section 1 of the aforesaid Fourteenth Amendment in denying to complainant the equal protection of the laws by laying complainant and other railroad carriers in Kentucky under the arbitrary power of said Railroad Commission and compelling them to litigate concerning the reasonableness of their rates under peril of the excessive fines and penalties specified in the Act in case of defeat in said litigation while other common carriers are not subjected to such arbitrary powers or to such perils; and in subjecting said railroad carriers to such regulation by such Commission of their rates and charges while other common carriers are not so subjected; and in compelling said railroad carriers to submit to the fiat of said Commission in fixing a rate of toll or charge for transportation by them with no opportunity for judicial investigation, nor to make defense in court as to the reasonableness of their rates except at the peril of enormous and ruinous and virtually prohibitory fines and penalties in event of failure to make good their claims in judicial proceedings while other transportation companies are exempted from such burdens and perils.

10. The said Act is in conflict with said Section of said Fourteenth Amendment in requiring railroad carriers to charge any rate whatsoever fixed by said Commission, whether reasonable or

125 not, or confiscatory or not, without opportunity for judicial investigation, or to make any defense to an indictment instituted because of the failure or refusal of the carrier or its officers or agents to charge the rate fixed by the Commission or charging a higher rate, except at the peril of paying excessive and ruinous fines and penalties in event of the failure to successfully defend, and because said Act permits no defense at all to the indictment provided for in the Act.

11. The Commission's aforesaid order of June 20, 1906, shows upon its face that the maximum rates prescribed in the said Standard Tariff No. 2 therein promulgated were arbitrarily made applicable to complainant, and were not made applicable for the same distances and on the same classes of freight to the other Railroad Companies operating lines in Kentucky, and although without statutory power or authority to classify the said railroad carriers in Kentucky on any basis whatever for the purpose of prescribing freight rates to be charged or collected by them, the said Commission by said order assumes to prescribe such maximum freight rates to be observed by complainant while other railroad carriers operating lines in Kentucky were and are permitted to charge and collect higher rates on the same classes of freight for the same distances, or to charge such freight rates as such other carriers may deem reasonable although said other carriers were made defendants to and proceeded against under the same complaints before the said Commission in the same proceedings which culminated in the making of the said order of June 20, 1906, promulgated July 20, 1906, and thus the attempted classification by said Commission in this respect was not based upon the character or value of the services rendered or upon any other just distinction, and said order is, there-
126 fore, unfair, discriminating and constitutes a denial to complainant of the equal protection of the laws in violation of the Fourteenth Amendment aforesaid to the Constitution of the United States.

June 18th, 1908.

TRABUE, DOOLAN & COX,
Counsel for Complainant, Illinois Central Railroad Company.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants filed their motion in said cause, which said motion is in words and figures as follows, viz:

The United States Circuit Court for the Eastern District of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

This day came the defendants and objected to complainant's written motion and grounds thereof, and moved the court, on the face of the pleadings, to enter an order dismissing this action, because

First. The bill does not show any equity; and the averments of defendants' answer with respect to questions raised by said motion must be taken as admitted.

Second. None of the grounds stated in said motion is sufficient to entitle complainant to the relief sought.

R. H. WINN,
127 B. H. YOUNG,
T. H. PAYNTER, &
C. C. McCHORD,
Attorneys for Defendants.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the opinion of the court was filed in the cause of the Louisville & Nashville Railroad Company *vs.* Adam T. Siler, *et al.*, which said opinion, by the last paragraph thereof, this being one of the three other cases, is made a part of this cause, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
vs.
A. T. SILER, McD. FERGUSON, & L. P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

This cause has been submitted on motion for a final decree as prayed in the bill, pursuant to stipulation of the parties.

In the case of Louisville & Nashville R. R. Co. *vs.* McChord, 103 Fed. 216, Judge Evans, after full argument and careful consideration, held what is known as the McChord Act involved herein to be unconstitutional and enjoined the Railroad Commissioners from taking action thereunder. On appeal to the Supreme Court this
128 decree was reversed.

McChord, *et al.*, *v.* L. & N. R. R. Co., 183 U. S. 483.

It was not reversed, however, on the ground that he had erred in holding said act unconstitutional, but on the ground that the action enjoined was legislation and a court had no authority to enjoin anticipated legislation. The question of constitutionality was waived and the only reference to it in the opinion was that it was a matter of "grave importance."

In the recent case of *In re* Young that went up from Minnesota, Mr. Justice Peckham cited Judge Evans' decision as an authority in support of the position there taken.

At the time of Judge Evans' decision this state had not been divided into two judicial districts. The decision was that of the United States Circuit Court for the District of Kentucky. This court has succeeded that court as to the Eastern District of Kentucky. In view of this, I do not think that I should consider the question on its merits. Comity requires that I should follow this holding of Judge Evans, backed up as it is, to a certain extent, by said reference to it by the

Supreme Court. I, therefore, in accordance with said decision, hold said act unconstitutional.

In addition I think it is to the interest of the parties to get this case to the Supreme Court as soon as possible where a decision can be had that is final as to the constitutionality of the act.

Until to-day I had not read the decision of the Supreme Court in the McChord case, all previous steps in this case, since the granting of the temporary restraining order, having been taken by consent of parties hereto; and I was under the impression that in that
129 case the Supreme Court had overruled Judge Evans' holding that said act was unconstitutional. Otherwise, possibly, I might have indicated this position to the parties earlier in this cause.

Question is made as to the jurisdiction of this court of this case on the ground that there is no diversity of citizenship. Under the decision in the case of Raymond *v.* Chicago Traction Co. 207 U. S. 20, it would seem that this court has jurisdiction because of the federal question, raised in the claim that the action of the Railroad Commissioners was in violation of the 14th amendment. If not, it has it because of the claim that said act itself is a violation thereof.

The motion is sustained and decree will be prepared accordingly.

Similar motions in the three other cases heard at same time are sustained and decrees in those cases will be prepared also.

July 10, 1908.

A. M. J. COCHRAN, *Judge.*

The foregoing opinion is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following decree was entered in said cause, viz:

130 United States Circuit Court, Eastern District of Kentucky.

No. 543.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Final Decree.

This day came the complainant and tendered and offered to file its amended bill, which is ordered to be filed, to which amended bill defendants filed their answer, and to which answer complainant filed its general replication.

Thereupon came counsel for complainant and counsel for defendants and tendered and offered to file their stipulation dated May 2nd, A. D., 1908, and their stipulation dated June 18th, 1908, which are ordered to be filed.

Counsel for complainant thereupon, in pursuance of said stipulations, entered their motion in complainant's behalf, dated June 18th,

1908, and moved the Court on the face of the pleadings, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky, pending the inquiry which culminated in the order of July 20th, 1906, and upon the written grounds set forth in said motion, to instruct the Special Master herein to report that the order of the Railroad Commission of Kentucky purporting to establish what is styled "Maximum Rates Kentucky Railroad Commission's Standard Tariff No. 2 Applicable to the Illinois Central Railroad Company," made June 20th, 1906, and promulgated July 20th, 1906, herein complained of, is void.

Thereupon counsel for defendants filed their objections to complainant's said motion, and entered their motion in behalf of
131 defendants, on the face of the pleadings and the written grounds set forth in their motion, that the court enter an order dismissing this suit.

And said motions having by agreement of counsel for plaintiff and defendants been set for hearing on this day, they were fully argued by said counsel for both complainant and defendants, and the Court being fully advised thereupon orders, adjudges and decrees as follows:

First. That the said objections and motion of the defendants be and they are overruled, and the said motion of the complainant be and it is sustained, the court being of opinion that the Act of the General Assembly of the Commonwealth of Kentucky mentioned in complainant's Bill of Complaint, known as the McChord Act and approved March 10, A. D. 1900, and the order of the Railroad Commissioners of Kentucky aforesaid promulgated July 20, 1906, complained of in this suit, irrespective of any claim that the said order is confiscatory, (upon which no decision is, or can now be made) violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting any State's depriving any person of property without due process of law, and denying to any person within its jurisdiction the equal protection of the laws, and that said order of said Commissioners so far as it is made applicable to complainant is null and void, and the Special Master is directed to so report herein.

Second. Thereupon counsel for complainant and counsel for defendants stipulated and agreed that the said report of the said Master shall be and it is now treated and considered as filed in the terms above prescribed; and thereupon this cause was submitted for a final decree and the court being further advised, orders, adjudges
132 and decrees that the preliminary injunction heretofore granted herein be and it is made perpetual, and the defendants, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, individually, and as constituting the Railroad Commission of Kentucky, their successors in office, and said Commission be and they are hereby perpetually enjoined and restrained from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, herein complained of, or putting the said order into force and effect, and from enforcing or attempting to enforce the said order so far as it is made applicable to complainant, or so far as it relates

to the lines of railroad operated by complainant in the State of Kentucky and from recommending or procuring indictments against complainant or any of its officers, agents or employés to recover any fine or penalty for any violation of said order, or for charging, collecting, or receiving any rate or rates in excess of those prescribed by said order; and said defendants are further enjoined and required to revoke and cancel said order so far as it prescribed or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 2 applicable to the Illinois Central Railroad Co."

Third. It is further ordered, adjudged and decreed by the court that the question of costs is not now determined but that either party may, after the final determination of this cause in the Supreme Court of the United States, move for an order in regard thereto at the foot of the decree.

Fourth. Then came defendants and in open court prayed and are allowed an appeal from this decree to the Supreme Court of the United States.

133 Defendants shall execute a bond in the penalty of Five Hundred ($500.00) Dollars, (but without surety) conditioned to prosecute said appeal, and file herein their assignment of errors, all within sixty days from the entry of this decree. No citation need be issued, the appeal being granted in open court and complainant being present.

The Assignment of Errors, referred to in the foregoing decree, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Assignment of Errors.

The above-named defendants, Adam T. Siler, McD. Ferguson and L. P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, conceiving themselves aggrieved by the judgment entered herein on the 10th day of July, 1908, in the above-entitled cause, pray the court that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the Supreme Court of the United States. Defendants say that in the record and proceedings in said above-entitled cause there is manifest error in this, to-wit:

1. The Circuit Court of the United States for the Eastern District of Kentucky erred in holding and deciding that said court was

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bound by and should follow the decision of the United States
134 Circuit Court for the District of Kentucky in the case of Louisville & Nashville Railroad Company *vs.* McChord, *et al*, as reported in 103 Federal 216, and in its interpretation of the opinion in McChord, *et al.*, *vs.* Louisville & Nashville Railroad Company reported in 183 U. S. 483, reversing said former decree.

2. That said Court erred in rendering judgment against these defendants upon the pleadings in said cause; said judgment is contrary to law and the facts as presented by said pleadings.

3. That said court erred in holding that the Act of the General Assembly of the Commonwealth of Kentucky, approved March 10, 1900, and the order of the Railroad Commission of Kentucky promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory, violate the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which prohibit any State from depriving any person of property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws and in holding that said order of said Commission, as far as it is made applicable to complainant is either null or void and in directing that the Special Commissioner so report.

4. That said Court erred in rendering a perpetual order of injunction against these defendants and their successors in office and said Commission, enjoining and restraining them from continuing said order of said Commission made June 20, 1903, and promulgated July 20, 1906, and from putting the same into force or effect, and from enforcing or attempting to enforce the same as far as it is made applicable to complainant or as relates to the lines of railroad owned or operated by complainant in the State of Kentucky.

135 5. That said Court erred in adjudging that these defendants be further enjoined to revoke and cancel said order as far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 2, applicable to complainant and its said lines of railroad in Kentucky.

6. That said Court erred in overruling defendants' objections to complainant's motion and grounds of motion upon which motion and grounds the decree herein was rendered; and in overruling defendants' motion that on the face of the pleadings an order be entered dismissing this action; and said court further erred in sustaining complainant's said motion and grounds of motion, as follows:

(*a*) That said Act of March 10, 1900, undertakes to vest in said Commission Legislative, Executive, and Judicial powers in violation of Sections 27, 28 109 and 135 of the Constitution of the State of Kentucky and that said Act is, therefore, unconstitutional, null and void.

(*b*) That because said Act does not provide for an appeal to a court from the final order of said Commission nor for any judicial investigation, or judicial review of the question of the reasonable-

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ness of any rate fixed by said Commission for services thereafter to be rendered before it is required to put same into force and effect, such order deprives the carrier of its property without due process of law and denies to it the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

(*c*) That the penalties imposed by said Act are so enormous as to render the Act on its face violative of the provisions of
136 Section One of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from depriving any person of property without due process of law or denying to any person within its jurisdiction the equal protection of the law; and

(*d*) That said Act is unconstitutional and void because it undertakes to vest in said Commission the judicial power of adjudging a carrier guilty of extortion before fixing a rate which the carrier may charge and without affording an opportunity to be heard in any court and thereby deprives the carrier of its property without due process of law and denies to it the equal protection of the laws guaranteed by the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States; and

(*e*) That said Commission was not authorized or empowered to prescribe and establish schedules of maximum rates; and

(*f*) That the allegations of the complaints on which the order complained of was made were insufficient to give the Commission jurisdiction or to authorize it to make said order; and

(*g*) That said Commission had no power to forbid complainant from charging or receiving rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances than those shown in said Commission's Standard Tariff No. 2; and

(*h*) That said Kentucky Railroad Commission's Standard Tariff No. 2 was arbitrarily made applicable to complainant and was not made applicable for the same distances and on the same classes of freight to all other railroad companies operating lines in
137 Kentucky and on that account that said order is unfair, discriminating and amounts to a denial to complainants of the equal protection of the laws in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, said Adam T. Siler, McD. Ferguson and L. P. Tarlton pray that the decree and order of the said Circuit Court of the United States for the Eastern Dist. of Kentucky appealed from herein be reversed.

JAMES BREATHITT,
Att'y Gen'l.

R. H. WINN &
C. C. McCHORD,
Counsel for Defendants.

The foregoing Assignment of Errors is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants executed an appeal bond in said cause, which said bond is in words and figures as follows, viz:

Know all men by these presents, That We, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, as principal, and —— —— — —— ——, as sureties, are held and firmly bound unto the Illinois Central Railroad Company in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Illinois Central Railroad Company, its certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs,
138 executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of July, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court for the 10th day of July, in a suit depending in said Court, between the Illinois Central Railroad Company, complainant, and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, defendants, a decree was rendered against the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, and the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. T. SILER, *Commissioner.*
McD. FERGUSON, *Commissioner.*
L. P. TARLTON, *Com'r.*

Sealed and delivered in presence of
EMILY H. COLEMAN.
CHAS. N. WIARD.

Approved by
A. M. J. COCHRAN,
U. S. District Judge.

The foregoing bond is endorsed in words and figures as follows, viz: Filed Jul- 10, 1908. Charles N. Wiard, Clerk.

139 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

I, Charles N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing One Hundred and Thirty-eight (138)

pages contain a true and complete copy of all the papers filed and proceedings had and entered in the cause, lately pending in the said court wherein the Illinois Central Railroad Company was Complainant and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, were defendants, as the same will appear from the records and files of my said office; that I have compared the same with the originals, and it is a true and complete transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand as Clerk of the aforesaid Court, and affixed the seal thereof, at Frankfort, in said District, this the 11th day of August, A. D., 1908, and of the Independence of the United States the 133rd year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court, Eastern District of Kentucky, at Frankfort.

Endorsed on cover: File No. 21,318. E. Kentucky C. C. U. S. Term No. 522. Adam T. Siler, McDougal Ferguson, and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, appellants, *vs.* Illinois Central Railroad Company. Filed August 27, 1908. File No. 21,318.

(21,319.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 523.

ADAM T. SILER, McDOUGAL FERGUSON, AND LEW P. TARLTON, CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Record of the Proceedings of the Circuit Court of the United States for the Eastern District of Kentucky, in the Cause and Matter Hereinafter Stated, the Same Being Disposed of at a Regular Term of said Court Begun and Held in the City of Frankfort on the Second Monday in March, A. D. 1908, Being the 9th Day of said Month, and the Final Decree in said Cause Being Entered on the 10th Day of July, A. D. 1908.

Present: The Honorable A. M. J. Cochran, United States District Judge.

In Equity. No. 544.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,

vs.

ADAM T. SILER, MCDOUGAL FERGUSON, and LEW P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

2 Said Action was commenced on the 25th day of July, A. D. 1906, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

On the 25th day of July, A. D. 1906, Complainant filed its Bill of Complaint in said cause, which said Bill is in words and figures as follows, viz:

3 To the Judges of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky:

Your complainant, Southern Railway Company in Kentucky, brings this, its bill of complaint, against Charles C. McChord, McDougal Ferguson and Adam T. Siler, who compose what is known as the Railroad Commission of Kentucky, and thereupon your complainant says:

I.

That it is a corporation duly created by and organized under the laws of the State of Kentucky and is a citizen and resident of said State, and that the defendants, Charles C. McChord, McDougal Ferguson and Adam T. Siler, are and each of them is a citizen and resident of the State of Kentucky, and that the amount in controversy in this cause exceeds the sum or value of $5,000, exclusive of interest or costs.

II.

Your complainant is now and for some time last past has been the owner and in the possession and control, viz., by ownership in fee simple, but of a small part under trackage rights, of the following described lines of railroad in the State of Kentucky, viz.: Beginning at Louisville, in Jefferson county, running thence through the counties of Shelby, Anderson, Mercer and Boyle, to Danville, Kentucky, with a branch line from Lawrenceburg in Anderson county,
4 Kentucky, through the counties of Anderson, Woodford and Fayette to Lexington in Fayette county, and with a branch from said branch running from Versailles in Woodford county through the counties of Woodford and Scott to Georgetown in Scott county, Kentucky, and with a branch line from Harrodsburg in Mercer county, Kentucky, to Burgin in said county; the total mileage of lines owned and operated by the complainant being 138 miles. The traffic conducted by it on its various lines differs in that upon some of such lines the traffic is much greater than upon others and of such a character that the expense of conducting transportation is less than upon others, while upon others the traffic is small, hardly remunerative at all, and of a character and extent that the expense of conducting transportation approximates closely, if it does not equal, the revenue received by the complainant.

III.

Your complainant further states that in the Constitution of the State of Kentucky it is provided by Section 209 that a commission is thereby established, to be known as the Railroad Commission and to be composed of three commissioners; and that the powers and duties of the Railroad Commission shall be regulated by law. The legislature of the State of Kentucky has passed certain acts, vesting in the said Railroad Commission certain powers and imposing upon it certain duties, the scope or extent whereof is not now necessary to be particularly stated.

The defendants, Charles C. McChord, McDougal Ferguson and Adam T. Siler, are and have been during all of the times hereinafter stated, the members of said Commission.

5 It is provided by law that the office of the Commission shall be at the seat of government, which is Frankfort, Kentucky, which is within the Eastern District of the State of Kentucky.

The legislature of the State of Kentucky passed an act which was approved March 10, 1900, and which is now contained in what is known as Carroll's Kentucky Statutes (Edition of 1903), as section 820-A.

IV.

By the said Section 820-A, above referred to, it is provided that "when complaint shall be made to the Railroad Commission, accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information or have reason to believe that such rate or rates

are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the corporation or company complained of, not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same, and also the nature of the complaint or matter to be investigated, and shall hear such argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad
6 company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered, than that made and fixed by said Commission as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined, for the first offense, in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction, in any sum not less than two thousand dollars nor more than five thousand dollars."

It is further provided that the Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation, and the Circuit Court of the county in which such offence may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

7

V.

Your complainant further states that in the early part of the year 1905 certain merchants living and doing business in Owensboro, Kentucky, to wit, J. Ed Guenther and others, made a complaint before the Railroad Commission, complaining of certain rates made by the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and the Louisville, Henderson & St. Louis Railroad Company. No complaint was made in regard to any rate of your complainant, and the said town of Owensboro is not on your complainant's line of railway, nor, at the nearest point, less than 114 miles therefrom nor, to your complainant's knowledge, were any of these merchants shippers over any of your complainant's lines of railway.

On August 26, 1905, the said persons, who had filed the petition above referred to, presented to the Railroad Commission an amended complaint, to which substantially all the railroads in Kentucky were made parties defendant, and among others, your complainant, and in which it was alleged as follows:

"The complainants aver and charge that all local freight rates from and to all local points in the State of Kentucky, as fixed and charged by the defendant railroads, on all classes of freight, are excessive, discriminatory and extortionate;"

and in which it was also alleged:

"The complainants aver that the local rates of freight as fixed, maintained and charged by the defendants herein, are ex-
8 orbitant, excessive and extortionate. They say that some of the rates are excessive; that many of them are extortionate; and all of them discriminate in favor of some local communities as against other local communities, and that the rates charged and maintained by defendant companies are in open violation of law, against public policy, illegal and extortionate;"

and in which it was further alleged:

"Complainants further state that the local rates fixed, maintained and charged by defendant railroads throughout the State of Kentucky, are not uniform; that they do not treat each local community with fairness or equitably, but the rates are arbitrarily fixed and maintained so as to build up a community or discriminate against it at the pleasure of defendant companies."

The prayer of said complaint is as follows:

"Wherefore your complainants pray this honorable Commission not only to revise the local freight rates in and out of the city of Owensboro, but to revise and adjust the rates between all local points, from and to every local point throughout the entire State of Kentucky, and on final hearing they pray for all relief to which they are entitled, both at law and in equity."

Your complainant states that nowhere in said amended petition was there pointed out any rate of your complainant which was alleged to be either extortionate or unjust or unreasonable; that the only charge made against your complainant's rates was as contained in the extracts given above from said amended complaint, and these, as will be seen, were of the most general, sweeping and indefinite character.

9 VI.

Your complainant further states that subsequently, to wit on September 14, 1905, the Louisville Veneer Mills and several others united in a petition to be made parties to the proceeding instituted as above. In this petition it was alleged that the petitioners were residents of the State of Kentucky and engaged in shipping lumber, logs, ties and all timber commodities from point to point in the State of Kentucky, over the railroads owned, controlled and operated by the defendants in the State of Kentucky. The said petition contained also the following:

"Petitioners aver and charge that all local freight rates from and to all points in the State of Kentucky, on all commodities, as fixed and charged by the defendant railways, are excessive and extortionate, and that the freight classifications are discriminatory and extortionate. Petitioners aver and charge that the rates and classifications on lumber, logs, ties and all timber commodities to and from all points in Kentucky are especially extortionate, discriminatory and unreasonable."

The said petition further stated that the rate on railroad or cross ties from non-competitive points to all other points in the State of Kentucky is so fixed by the defendants that it amounts to confiscation and prevents the producer or owner of said railroad or cross ties from getting them to any open market.

The petition further averred that the rate on cherry, walnut and cedar timber, lumber and logs, to and from all points in
10 Kentucky, was fixed by defendants at three cents per hundred pounds higher than the rate on all other classes of timber, logs and lumber, and that there was no sound or legal reason for said increased charge on cherry, walnut and cedar timber.

The said petition made a further complaint in regard to petitioners being required to furnish certain standards and sidings for the loading of logs on flat cars.

The petition prayed that the petitioners be made parties complainant, and that the allegations made in the complaint be tried at the hearing herein; that the rates in Kentucky on lumber, logs, ties and all timber products be revised and adjusted, and that all rates on all commodities in Kentucky be reviewed and revised.

On October 14, 1905, the Commonwealth of Kentucky undertook to file an intervening petition, in which, without complaining of any special rates, it made the same general complaint as to all rates to and from every local station and upon every railroad in Kentucky as is stated above in reference to the complaints of the original complainants and of the Louisville Veneer Mills and others, who came in by petition to be made parties, as above alleged.

VII.

Before answering the complaints, amended complaints and intervening petition in the proceeding aforesaid, this complainant, before the defendants constituting said Commission, took the following steps, to wit:

Filed special and general demurrers to the amended complaint of Guenther, Louisville Veneer Mills and the Commonwealth of Kentucky:

11 Moved to require an election as to which one of the several defendant railroad companies would be proceeded against;

Moved that the said complaints and amended complaints be made more definite and certain;

Moved that a bill of particulars be filed;

Moved that the said amended complaint of the said Guenther and

others, and the intervening petitions of the Louisville Veneer Mills and the Commonwealth of Kentucky be stricken from the files;

And in every way insisted that proceedings of such general character could not be maintained, and that the Commission could not make such general proceedings a basis of investigation of rates charged by this complainant;

But each and all of the said demurrers and motions were overruled, ignored and disregarded by the said defendants herein, the Railroad Commission, as were like demurrers and motions made at the same time by the other carriers made defendants to said proceeding.

Thereupon said Commission ruled that the entire subject of railroad rates was before it.

This complainant, then, without waiving any of its said demurrers or motions, filed its answer, traversing every affirmative allegation and material averment of said complaints, amended complaints and intervening petitions.

The complaint of the said lumber companies was first taken up and a decision rendered thereon December 7, 1905, by said Commission, so far as the same pertains specifically to the rates on logs, lumber and cross ties, and to stakes or standards on flat cars loaded with logs or lumber. The Commission ordered, in substance, that all the railroad carriers made defendants to said proceeding should:

12 1. Make their rates on walnut, cherry and cedar lumber no higher than the rates then shown on their published tariffs on oak, poplar and other grades of lumber, and their rates on walnut, cherry and cedar logs no higher than the rates then shown on their published tariffs on oak, poplar and other grades of logs, and that said log rate should be no higher than seventy per cent. of their lumber rate so fixed;

2. Make their rates on cross ties no higher than their rates on lumber thus fixed, and

3. Make no charge for the transportation of stakes or standards used in equipping their flat cars for the transportation of logs and lumber.

This complainant's rates and regulations were substantially as fixed by the defendants, and in such small particulars as they were different this complainant has complied with said order.

VIII.

Your complainant further states that notwithstanding this order really completed all that was properly before the said defendants, even if this was properly before them, the defendants assumed and continued an inquiry under the altogether vague and general and insufficient allegations above mentioned. No proof was introduced by any of the complaining parties, before the said defendants, or by any one, that any rate or rates of this complainant were unjust, extortionate or unreasonably high. No evidence was introduced before the said defendants showing the condition or circumstances

surrounding traffic handled by this complainant, the expense
13 of conducting various cl.. es of traffic, the character of such traffic, or any other fact from which said defendants could form any judgment that the rates charged by this complainant, or any of them, were unjust, unreasonable or extortionate. Nevertheless, the said defendants did, on July 19, 1906, enter an order, which, so far as it relates to this complainant, is as follows:

"The Commission is further of the opinion that all rates now in effect upon the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway in Kentucky, as shown by their respective tariffs and mileage scale of rates on file in this office, respectively, to wit: Cincinnati, New Orleans & Texas Pacific Railway Company's Local Mileage Tariff Number 8, effective January 1, 1906, and Southern Railway Company in Kentucky's Local Tariff Number 4, effective February 27, 1905, where the same are in excess of the mileage scale of rates hereinbefore fixed for the defendant, the Louisville & Nashville Railroad Company, and herein designated 'Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad Company,' are hereby declared to be extortionate, unjust and unreasonable. It is therefore ordered that said Cincinnati, New Orleans & Texas Pacific Railway Company and said Southern Railway Company in Kentucky be, and they are, hereby forbidden to charge, collect or receive for the transportation of commodities, rates in excess of those herein permitted to be charged by said Louisville & Nashville Railroad Company as shown by said Standard Local Scale of Rates.

"Provided, however, that where either of said defendants, the said Cincinnati, New Orleans & Texas Pacific Railway Company
14 or said Southern Railway in Kentucky, now has in effect rates lower than those fixed by said standard scale, said defendants shall not charge, collect or receive rates in excess of said lower rates as now published by said defendants, respectively."

IX.

The complainant states that the effect of the order entered by the defendants on July 19, 1906, will be to reduce the revenue to be derived by this complainant from the operation of its freight trains, such reduction being direct upon intrastate traffic, and indirect, but just as surely, upon interstate traffic; that the direct reduction of its revenue upon intrastate traffic will be an amount which the complainant can not accurately compute but will be largely in excess of $2,000 a year—how much more, the complainant can not now say—and will be, and is, confiscatory in its character, and deprives the complainant of its property without due process of law, and devotes the property of the complainant to public use without just compensation.

The complainant states that for the year ending June 30, 1905, its total net earnings were..... $142,145.88;
that this was not an exceptional year; that this corporation was organized and acquired its property in September, 1894; that its average net earnings for the eleven years ending June 30, 1905, were 140,446.11;
that the cost of reproducing the property in Kentucky, of the complainant, necessarily used by the company in its operation as a railway common carrier, would not be less than..... 5,419,925.00;
15 that its total gross earnings for operations in Kentucky for the fiscal year ending June 30, 1905, were..... $1,058,015.70;
that the operating expenses, excluding taxes, were 893,244.14;
that the operating cost to earn one dollar of revenue was..... .8443
that this includes all traffic, interstate as well as intrastate;
that its gross earnings for said year from intrastate traffic were 427,130.85;
making the ratio of intrastate gross earnings to total gross earnings in Kentucky..... 40.37%
that the total gross earnings from freight for the aforesaid year were 776,913.07;
and the gross freight earnings from intrastate traffic were 237,502.33;
making the ratio of intrastate gross freight earnings to total gross freight earnings.... 30.57%
that the taxes for the fiscal year ending June 30, 1905, were 22,625.68;
and necessary improvements and betterments... 42,939.00.

The complainant says that the operating cost to earn one dollar of intrastate revenue is largely greater than the operating cost to earn one dollar of total revenue or interstate revenue, but that it is difficult to state exactly what this addition should be.

16 The complainant states that, assuming that the same proportion of property should be considered as used in intrastate traffic, as intrastate earnings bear to total earnings, then if the property employed is taken at what it would cost to reproduce it, $5,419,925.00, 40.37% would be. $2,188,023.72;
taking intrastate gross earnings in Kentucky at the figure given above, $427,130.85, and applying the general operating cost thereof, .8443, would leave the net earnings derivable from intrastate traffic, exclusive of taxes..... 66,504.28;
but from this must be deducted 40.37% of $22,625.68, taxes, or 9,133.98;

and 40.37% of $42,969.00, necessary improvements and betterments, which is..... $17,346.58; leaving the net earnings, even on the basis of the cost of .8443, which is largely less than the cost of operating as applied to intrastate traffic, only the sum of ..... 40,023.72.

The complainant asks leave to show, during the progress of the cause, with more accuracy, the larger cost of operation in conducting intrastate traffic. The complainant states that even if it is no greater (and complainant says it is largely greater), it will appear that the net revenue on the present scale of rates as applied by complainant is only 1.83 per cent. of the proper proportion of the cost of reproducing the property as given above.

The complainant states that, such being the case, there was no reason for reducing any of complainant's rates; that there was no evidence tending to show that any one of said rates was
17 either unjust, unreasonable or extortionate, nor was it charged specifically that any one of said rates was either unjust, unreasonable or extortionate.

The complainant states that its rates and each of them were in and of themselves just and reasonable, and that the return to the complainant upon the value of its property was far from that which it was entitled to receive, and any reduction of such return is in its nature confiscatory, and is a deprivation of the complainant of its property without due process of law, and violative of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto.

X.

The complainant further states that if the defendants had the right to make a general schedule of freight rates and compel the complainant to conform thereto, without determining, as to the several rates, by competent allegation and proof, that they were in and of themselves unjust, unreasonable and extortionate, and if the said defendants had the right to have an inquiry, in one proceeding, as to all the roads joined in the amended complaints of the said Guenther and the Louisville Veneer Mills, and the intervening petition of the Commonwealth of Kentucky, then the defendants had no right or authority to make a tariff of rates which would be applicable to each railroad in so far as such tariff was lower than or equal to the rates charged by such railroad, and at the same time to forbid this complainant and the other railroads from charging a rate equal to that prescribed in the said tariff, on all classes embraced therein, and the said defendants had no right to forbid this complainant from advancing rates which it had in effect at the time the said defendants entered their order herein, to the extent of equalizing them
18 with the rates fixed by the defendants in their general scale of rates and charges. Thus the complainant says that while in a large number of cases the rates which it now charges are higher than those fixed by the said order of July 19, 1906, adopting what is called "Maximum Rates, Kentucky Railroad Commission's Standard

Tariff No. 1," and which, by the said order entered July 19, 1906, is made applicable to this complainant, yet in various instances this complainant is now charging rates lower than the rates fixed by said Standard Tariff, and the said defendants do not adjudge that any rate lower than that fixed in said Standard Tariff is unjust, unreasonable or extortionate, but at the same time they forbid this complainant from charging such rate, for no other reason than that at the present time the complainant charges such rate.

The complainant states that each railroad in Kentucky makes certain exceptions from its classification, charging lower rates for certain distances and from and to certain points upon certain articles embraced within one or the other of the various numbered or lettered classes.

The complainant says that the purpose and effect of the order of July 19, 1906, is to fix certain rates for one railroad and lower rates for other railroads, without any regard to or any inquiry as to any difference in circumstances or condition, but simply based upon the accident that the tariffs of the said several railroads differ as between themselves in the manner above described.

The complainant states that whether the action of the said defendants be regarded as executive, legislative or judicial, it is special, partial, unjustly discriminatory, and violative of the Constitu-
19 tion of Kentucky in that it is special legislation and in that it is a taking or applying to public use of property without just compensation, and violative of the Constitution of the United States in depriving the complainant of its property without due process of law and denying to it the equal protection of the law as guaranteed by the said Constitution and particularly by the Fourteenth Amendment thereto.

XI.

The complainant states that the said act under which the said defendants are attempting to proceed, is violative of the Constitution of the State of Kentucky, and particularly of Sections 27, 28, 109 and 135 thereof, in that an attempt is made to vest in the defendants, as a railroad commission, powers, executive, legislative and judicial, and that it is violative of the Constitution of the United States, Subsection 3, Section 8 of Article I of that instrument, because it attempts to deal with interstate as well as intrastate traffic; that it is violative of the Constitution of the State of Kentucky and the Constitution of the United States, and particularly Section 1 of Amendment XIV, in that it is applicable alone to railroad companies and not to all common carriers, and denies to railroad companies the protection of the law equal to that enjoyed by other common carriers; and that it is violative of Section 17 of the Constitution of the State of Kentucky and Article VII of the Amendment to the Constitution of the United States in that it endeavors to impose fines which are excessive.

20 XII.

Complainant states that the amended complaint of the said Guenther and others, and the intervening petition of the said Louisville Veneer Mills and others, and the Commonwealth of Kentucky, purported to be against the Louisville & Nashville Railroad Company,

the Illinois Central Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Chesapeake & Ohio Railway Company, this complainant, the Lexington & Eastern Railroad Company, the Louisville & Atlantic Railroad Company, and all other railroads that operate their lines in the State of Kentucky; that the said order of the Commission is directed only against the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, your complainant, the Chesapeake & Ohio Railway Company and the Nashville, Chattanooga & St. Louis Railway Company (a company not specifically named but included in the general designation of "all other railroads that operate their lines in the State of Kentucky)"; that the defendants made no order against the Lexington & Eastern Railroad Company, the Louisville, Henderson & St. Louis Railway Company, the Louisville & Atlantic Railroad Company, nor sundry other railroads having and operating lines in the State of Kentucky, although the said named railroads and divers of the said unnamed railroads have in force and effect rates higher than those of the complainant and higher than those prescribed in the said order to be observed by the six railroads embraced in the
21 said order, and which rates are charged under substantially similar circumstances and conditions to some one or other of the railroads named in said order; and complainant says that the said order is partial, unjust and discriminatory and beyond the power and authority of the said Railroad Commission.

XIII.

The complainant states that it files herewith, as part hereof, a duly certified copy of the opinion and order of the said defendants hereinbefore referred to, and which, as above stated, was entered on July 19, 1906. No copy thereof was served upon this complainant until after said date.

The complainant says that if it shall refuse to put into effect the said rates as required by the said order, the said defendants threaten to and will cause a large number of proceedings to be instituted against this complainant in the Franklin Circuit Court and in the circuit courts of the several counties through which the complainant's road is operated, and will subject this complainant to a multitude of prosecutions, and will endeavor to cause large penalties to be inflicted upon this complainant; and the complainant says that the said statute under which the defendants are pretending to act provides no means by which this complainant can challenge the reasonableness of the rates embraced in the said order, and that it will be impossible for complainant to make any adequate defense before the large number of juries which will be called to try said cases; that the number of rates now charged by complainant, which
22 must be changed by reason of said order, is very great; and so it is that complainant has no adequate remedy at law and is of necessity bound to apply to this honorable court for equitable relief in the premises.

XIV.

Wherefore, complainant prays that the said defendants, their agents, servants and employés, and all other persons, be perpetually enjoined and restrained from requiring the complainant to put into force the rates set forth in the said order, or any of them, or from entering any complaint against complainant in any court on account of its disobedience of said order, or from recommending, seeking or asking any indictment, prosecution, penal action or other procedure against the complainant or any of its officers, agents, servants or employés, on account of any disobedience by the complainant or its officers, agents, servants or employés, of the terms of said order; and the complainant prays that the said order be declared in all respects null and void and beyond the authority of the said defendants, and of no force or effect as against this complainant. And your complainant prays that during the pendency of this suit and until a final decree can be had, an interlocutory injunction issue against the said defendants, their agents, servants and employés, in terms and to the effect of the final injunction as above prayed.

And complainant prays that there be granted unto your complainant a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the
23 said defendants, McChord, Ferguson and Siler, individually, and as Railroad Commissioners aforesaid, commanding them that on a day certain, to be named therein, and under a certain penalty, to be and appear before this honorable court, and then and there to answer, but not under oath (such oath being hereby expressly waived), all and singular the premises, and to stand to, perform and abide by such order, direction and decrees as may be made against them in the premises, and as shall seem to your honors to be meet and agreeable to equity and good conscience; and your complainant will ever pray.

HUMPHREY & HUMPHREY,
Attorneys for Complainant.

STATE OF KENTUCKY,
Jefferson County, sct:

The affiant, Alex. P. Humphrey, states that he is the principal officer of the complainant now in the State of Kentucky; that the facts stated in the foregoing bill, so far as stated on his personal knowledge, are true, and so far as stated on information, he believes to be true.

ALEX. P. HUMPHREY.

Subscribed and sworn to before me by Alex. P. Humphrey, this 24th day of July, 1906. My commission expires January 31, 1910.

LILLY R. WARREN,
Notary Public, Jefferson County, Kentucky.

Comparison of Old Rates with Maximum Rates.

Kentucky Railroad Commisson's Standard Tariff No. 1.

APPLICABLE TO THE LOUISVILLE & NASHVILLE RAILROAD CO.

DISTANCES.	In Cents Per Hundred Pounds.												Per Bbl.	Per 100 lbs.	Car Loads Per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L.	M	N
For 10 miles and less	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
	12	10	9	8	7	6	6	6	5	5	6	6	10	6	5	4	3
Over 10 miles and not over 15	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
	15	13	12	11	10	9	9	9	6	6	9	9	12	9	6	5	4
15 miles and not over 20	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
	20	17	15	13	12	11	11	11	7	7	11	11	14	11	7	6	5
20 miles and not over 25	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
	23	20	17	15	14	13	13	13	9	8	13	13	18	13	9	7	5
25 miles and not over 30	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
	26	23	20	17	16	15	15	15	10	8	15	15	20	15	10	7	6
30 miles and not over 35	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
	29	25	22	19	18	17	17	17	11	9	17	17	22	17	11	8	6
35 miles and not over 40	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
	32	27	24	21	20	19	19	19	12	9	19	19	24	19	12	8	6
40 miles and not over 45	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
	35	30	27	23	22	21	21	21	13	10	21	21	26	21	13	8	7
45 miles and not over 50	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
	37	32	28	25	24	22	22	22	14	10	22	22	28	22	14	9	7
50 miles and not over 55	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
	39	34	30	26	25	23	23	23	15	11	23	23	30	23	15	10	7
55 miles and not over 60	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
	41	35	31	28	26	24	24	24	16	11	24	24	32	24	16	12	8
60 miles and not over 65	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
	43	37	33	30	27	25	25	25	17	12	25	25	34	25	17	12	8
65 miles and not over 70	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
	45	39	34	31	28	26	26	26	17	12	26	26	34	25	17	13	8
70 miles and not over 75	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
	47	41	36	32	29	27	27	27	18	13	27	27	36	25	18	13	9
75 miles and not over 80	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
	49	42	37	33	30	28	28	28	18	14	28	28	36	25	19	14	9
80 miles and not over 85	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
	51	44	39	34	31	29	29	29	19	15	29	29	38	25	19	14	9
85 miles and not over 90	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	6
	53	45	40	35	32	30	30	30	19	15	30	30	38	25	19	15	10
90 miles and not over 95	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	6
	54	46	41	36	32	30	30	30	19	15	30	30	38	25	19	15	10
95 miles and not over 100	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	6
	55	47	42	37	32	30	30	30	20	15	30	30	40	25	20	15	10
100 miles and not over 110	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	6
	56	48	43	38	33	31	31	31	20	15	31	31	40	26	21	16	11
110 miles and not over 120	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	6
	58	50	44	39	34	32	32	32	21	16	32	32	42	26	22	16	11

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Applicable to the Louisville & Nashville Railroad Co.—Continued.

DISTANCES.	In Cents Per Hundred Pounds.												Per Bbl.	Per 100 lbs.	Car Loads Per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
120 miles and not over 130	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
	60	52	46	41	36	33	33	33	21	16	33	33	42	27	23	17	12
Over 130 miles and not over 140	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
	62	53	47	42	37	34	34	34	22	17	34	34	44	27	24	17	12
140 miles and not over 150	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
	64	55	49	44	39	36	36	36	22	17	36	36	44	28	25	18	13
150 miles and not over 160	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
	66	57	50	45	40	37	37	37	23	18	37	37	46	28	26	18	13
160 miles and not over 170	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
	68	59	52	47	42	38	38	38	23	18	38	38	46	29	27	19	14
170 miles and not over 180	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
	70	60	53	48	43	39	39	39	24	19	39	39	48	29	28	20	15
180 miles and not over 190	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
	72	62	54	49	44	40	40	40	24	19	40	40	48	30	29	20	15
190 miles and not over 200	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
	74	64	55	50	45	41	41	41	25	20	41	41	50	30	30	21	16
200 miles and not over 210	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
	78	65	56	51	46	42	42	42	25	20	42	42	50	30	30	21	16
210 miles and not over 220	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
	78	67	57	52	47	43	43	43	26	20	43	43	52	31	32	22	17
220 miles and not over 230	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
	80	69	58	53	48	44	44	44	26	20	44	44	52	31	33	22	17
230 miles and not over 240	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
	82	71	59	54	49	45	45	45	27	21	45	45	54	31	34	23	18
240 miles and not over 250	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
	84	72	60	55	50	46	46	46	27	21	46	46	54	32	36	23	18
250 miles and not over 275	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
	87	75	61	56	51	47	47	47	28	22	47	47	56	32	38	24	19
275 miles and not over 300	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
	90	77	62	57	52	48	48	48	28	22	48	48	56	32	39	25	20
300 miles and not over 325	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
	93	79	63	58	53	49	49	49	29	23	49	49	58	32	40	26	21
325 miles and not over 350	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
	96	81	64	59	54	50	50	50	29	23	50	50	58	33	42	27	22
350 miles and not over 375	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
	99	83	65	60	55	51	51	51	30	24	51	51	60	33	44	28	23
375 miles and not over 400	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
	102	85	66	61	56	52	52	52	30	24	52	52	60	33	46	29	24
400 miles and not over 425	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
	104	86	67	62	57	53	53	53	32	25	53	53	64	34	47	30	25
425 miles and not over 450	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19
	106	87	68	63	58	54	54	54	34	25	54	54	68	34	48	30	25

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Comparison of Old Rates with Maximum Rates.

Kentucky Railroad Commission's Standard Tariff No. 2.

APPLICABLE TO THE ILLINOIS CENTRAL RAILROAD CO.

DISTANCES.	In Cents Per Hundred Pounds.												In cts. per bbl.	In Cents Per 100 Lbs				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
For 10 miles and less	10 25	8 21	7 17	6 15	6 13	5 11	5 9	5 11	4 10	4 10	3 14	5 15	8 20	4 11	4 11	3 5	2½ 4½	1 4
Over 10 miles and not over 15	12 31	10 26	10 21	9 19	8 17	7 14	7 12	7 14	5 13	5 12	7 17	7 20	10 26	5 14	5 14	4 5	3 5	3 5
15 miles and not over 20	16 31	14 26	12 21	10 19	10 17	9 14	9 12	9 14	6 13	6 12	9 17	9 20	12 26	6 14	6 14	5 5	4 5	4 5
20 miles and not over 25	17 37	15 31	13 25	11 22	11 19	10 16	10 15	10 16	7 15	6 14	10 19	10 22	14 30	7 16	7 16	5 7	4 6	4 6
25 miles and not over 30	20 37	17 31	15 25	13 22	12 19	11 16	11 15	11 16	8 15	6 14	11 19	11 22	16 30	8 16	8 16	5 7	5 6	5 6
30 miles and not over 35	22 41	19 34	17 28	14 25	14 22	13 19	13 18	13 20	8 17	7 16	13 21	13 25	16 34	8 16	8 16	6 8	5 6	5 6
35 miles and not over 40	24 41	20 34	18 28	16 25	15 22	14 19	14 18	14 20	9 17	7 16	14 21	14 25	18 34	9 16	9 16	6 8	5 6	5 6
40 miles and not over 45	26 45	23 38	20 31	17 28	17 25	16 22	16 24	16 24	10 20	8 18	16 24	16 29	20 40	10 17	10 17	6 9	5 7	5 7
45 miles and not over 50	28 45	24 38	21 31	19 28	18 25	17 22	17 24	17 24	11 20	8 18	17 24	17 29	22 40	11 17	11 17	7 9	5 7	5 7
50 miles and not over 55	29 49	26 41	23 35	20 31	19 27	17 24	17 26	17 26	11 21	8 19	17 25	17 31	22 42	11 18	11 18	8 10	5 8	5 8
55 miles and not over 60	31 49	26 41	23 35	21 31	20 27	18 24	18 26	18 26	12 21	8 19	18 25	18 31	24 42	12 18	12 18	9 10	6 8	6 8
60 miles and not over 65	32 53	28 44	25 36	23 32	20 28	19 26	19 28	19 28	13 22	9 20	19 26	19 32	26 44	13 18	13 18	9 11	6 9	6 9
65 miles and not over 70	34 53	29 44	26 36	23 32	21 28	20 26	20 28	20 28	13 22	9 20	20 26	20 32	26 44	13 18	13 18	10 11	6 9	6 9
70 miles and not over 75	35 55	31 46	27 37	24 33	22 30	20 28	20 28	20 28	14 23	10 21	20 28	20 34	28 46	14 20	14 20	10 12	7 9	7 9
75 miles and not over 80	37 55	32 46	28 37	25 33	23 30	21 28	21 28	21 28	14 23	11 21	21 28	21 34	28 46	14 29	14 20	11 12	7 9	7 9
80 miles and not over 85	38 58	33 48	29 39	26 35	23 32	22 30	22 30	22 30	14 23	11 22	22 28	22 35	28 50	14 20	14 20	11 12	7 9	7 9
85 miles and not over 90	40 58	34 48	30 39	26 35	24 32	23 30	23 30	23 30	14 23	11 22	23 28	23 35	28 50	14 20	14 20	11 12	8 9	8 9
90 miles and not over 95	41 60	35 50	31 41	27 36	24 32	23 30	23 30	23 30	14 26	11 23	23 30	23 36	28 52	14 21	14 21	11 13	8 9	8 9
95 miles and not over 100	41 60	35 50	32 41	28 36	24 32	23 30	23 30	23 30	15 26	11 23	23 30	23 36	30 52	15 21	15 21	11 13	8 9	8 9
100 miles and not over 110	42 61	36 51	32 42	29 37	25 33	23 31	23 31	23 31	15 27	11 24	23 31	23 37	30 54	16 22	16 22	12 14	8 10	8 10

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Applicable to the Illinois Central Railroad Co.—Continued.

DISTANCES.	In Cents Per Hundred Pounds.												In cts. per bbl.	In Cents Per 100 Lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
110 miles and not over 120	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8
	62	52	42	37	33	32	32	32	27	24	32	37	54	22	22	15	10	10
120 miles and not over 130	45	39	35	31	27	25	25	25	16	12	25	25	32	17	17	13	9	9
	64	53	43	38	34	33	33	33	28	24	33	38	56	23	23	15	10	10
Over 130 miles and not over 140	47	40	35	32	28	26	26	26	17	13	26	26	34	18	18	13	9	9
	65	54	44	39	35	34	34	34	28	24	34	38	56	24	24	15	10	10
140 miles and not over 150	48	41	37	33	29	27	27	27	17	13	27	27	34	19	19	14	10	10
	66	56	45	41	36	35	35	35	30	25	35	38	60	25	25	16	11	11
150 miles and not over 160	50	43	38	34	30	28	28	28	17	14	28	28	34	20	20	14	10	10
	66	57	46	42	37	36	36	36	32	25	36	38	64	26	26	16	11	11
160 miles and not over 170	51	44	39	35	32	29	29	29	17	14	29	29	34	20	20	14	11	11
	68	59	48	44	39	38	38	38	33	25	38	40	66	28	28	17	12	12
170 miles and not over 180	53	45	40	36	32	29	29	29	18	14	29	29	36	21	21	15	11	11
	70	61	50	46	40	39	40	40	34	25	39	41	68	29	29	17	12	12
180 miles and not over 190	54	47	41	37	33	30	30	30	18	14	30	30	36	22	22	15	11	11
	71	62	51	47	41	40	41	41	34	25	40	42	68	30	30	17	12	12
190 miles and not over 200	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12	12
	72	63	52	48	42	40	42	42	34	25	40	42	68	30	30	17	12	12
200 miles and not over 210	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12	12
	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
210 miles and not over 220	59	50	43	39	35	32	32	32	20	15	32	32	40	24	24	17	13	13
	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
220 miles and not over 230	60	52	44	40	36	33	33	33	20	15	33	33	40	25	25	17	13	13
	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
230 miles and not over 240	62	53	44	41	37	34	34	34	20	16	34	34	40	26	26	17	14	14
	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
240 miles and not over 250	63	54	45	41	38	35	35	35	20	16	35	35	40	27	27	17	14	14
	82	72	59	54	48	46	48	48	36	25	46	48	72	36	36	18	13	13
250 miles and not over 275	65	56	46	42	38	35	35	35	21	17	35	35	42	29	29	18	14	14
	85	75	61	56	50	47	49	49	36	25	48	49	72	38	38	18	13	13
275 miles and not over 300	68	58	47	43	39	36	36	36	21	17	36	36	42	29	29	19	15	15
	88	77	63	57	52	48	50	50	36	25	50	50	72	39	39	18	13	13
300 miles and not over 325	70	59	47	44	40	37	37	37	22	17	37	37	44	30	30	20	16	16
	91	79	64	58	53	49	51	51	36	26	51	51	72	41	41	19	14	14

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

24 The foregoing Bill of Complaint is endorsed in words and figures as follows, viz: Filed July 25th, 1906, W. G. Chapman, Clerk.

Exhibit, filed with the foregoing Bill of Complaint, is in words and figures as follows, viz:

25 OPINION AND ORDER

OF THE

RAILROAD COMMISSION,

GOVERNING RATES

ON

GENERAL MERCHANDISE ON RAILROADS IN KENTUCKY.

THE COMMONWEALTH OF KENTUCKY, &c., Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

C. C. McChord, Chairman.

McD. Ferguson, Com. First Dist. A. T. Siler, Com. Third Dist.

Louisville:
Geo. G. Fetter Company.
1906.

(Here follow facsimiles, marked pp. 26, 27, 28, and 29.)

30 Before the Railroad Commission.

THE COMMONWEALTH OF KENTUCKY, &C., Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

Opinion and Order of the Commission.

The several complaints which, for convenience, have been consolidated and heard together in this investigation, raise for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon all railroads to and from all points within the State. Throughout the entire investigation this Commission has not been unmindful of the very great importance of the issues involved to the shippers and consumers throughout the Commonwealth as well as the railroads. It has been our endeavor to ascertain the truth in order that we might intelligently discharge our duties under the law. And we approach the determination of this exceedingly important case fully impressed with the magnitude of the responsibility thus devolved upon the Commission and the propriety of rendering a decision, which, under a broad view of all the attending circumstances, may be characterized as fair and just.

The annual reports of all the railroads for the fiscal year ended June 30, 1905, show the total mileage in the State to be 3,374, the total gross receipts $34,856,447, total net receipts $9,754,957. The valuation placed by the Railroad Commission upon all the tangible property of these railroads was for the year indicated $61,149,924.

Our investigation of the rate situation shows that all rates
31 charged by the railroads in Trunk Line and Central Freight Association territory, which is that territory north of the Ohio and east of the Mississippi rivers, to and from points on the Ohio river are very much lower than are the rates south of the Ohio river. Through rates are made to the Ohio river, but to points south of the Ohio river the full local rates are added to the through rates. We find that the principal portion of Kentucky is served by the Louisville & Nashville, the Illinois Central, the Southern Railway in Kentucky, the Cincinnati, New Orleans & Texas Pacific and the Chesapeake & Ohio Railway.

As regards the adjustment of rates, we find that the present rates upon all these railroads have been in effect for many years. In fact, very few changes in rates have been made except to occasionally lower or raise some of them, notwithstanding the fact that the volume of business has very greatly increased and the receipts of all the roads have steadily grown and the remarkable improvement in motive power and equipment enables them to handle the traffic with much less labor and cost proportionate to the volume of business done.

The lowest rates charged by any of the defendants are those charged by the Cincinnati, New Orleans & Texas Pacific Railway

Company, and this road has forced the Louisville & Nashville Railroad Company on its Kentucky Central Division, embracing 254 miles, and also the Southern Railway in Kentucky, to meet its rates. It is claimed by the defendants that the rates charged by the Cincinnati, New Orleans & Texas Pacific Railway Company are entirely too low, and the fact is cited that some years ago this road was forced into bankruptcy, and that the Kentucky Central Division of the Louisville & Nashville Railroad Company, which was formerly an independent corporation, was likewise forced into bankruptcy, as was also the Louisville Southern Railway, now the Southern Railway in Kentucky. It is earnestly contended that it would not be fair to require the other railroads in the State to reduce their rates to those charged by the Cincinnati, New Orleans & Texas Pacific Railway Company.

It is true these roads were at one time forced into the hands of a receiver, but for years past they have been prosperous and money-makers. In fact, the defendant, the Louisville & Nashville Railroad Company, which is conceded to be a good business institution, purchased the Kentucky Central Railroad, knowing that it would be compelled to charge the low rates forced upon it by the Cincinnati, New Orleans & Texas Pacific Railway Company. Under this adjustment of rates this latter road serves points like the city of Cincinnati and patrons on its line, with but few exceptions, at rates 25 per cent. lower than the Louisville & Nashville and Illinois
32 Central serve their patrons out of the city of Louisville and patrons on their lines, except that to points on the Kentucky Central Division of the Louisville & Nashville south of Paris, the Louisville & Nashville Railroad Company serves its patrons out of Louisville at the Cincinnati rate.

It will thus be seen that under the present adjustment of rates one section of the State is served upon better terms than the others. It is argued that the various communities throughout the State and business institutions have been built up and fostered under the present adjustment of these rates, and that any radical departure from this adjustment would be disastrous not only to the shippers, but to the communities served by the railroads.

The Commission has endeavored to weigh all the facts and to familiarize itself with the conditions as they actually exist, and we do not believe any such disastrous results will follow the conclusions we have reached in this investigation.

The several complaints herein allege that all the rates upon all the railroads in the Commonwealth of Kentucky are unjust, unreasonable, extortionate and discriminatory. In view of the fact that most of the traffic in Kentucky is carried, and a greater portion of the State is traversed and served by six of the principal railroads, to-wit: The defendants, the Louisville & Nashville, the Illinois Central, the Chesapeake & Ohio, the Louisville, Henderson & St. Louis, the Cincinnati, New Orleans & Texas Pacific and the Southern Railway in Kentucky, this investigation has, so far, been mainly confined to these six roads. Copies of each complaint were furnished to the defendants, all of whom filed answers in which each and all

denied that their rates as a whole or any part thereof are either unjust, unreasonable, extortionate, or discriminatory.

In order to intelligently pass upon these questions and to enable the Commission to have all information possible to be obtained bearing upon the question of rates and the operation of the railroads, a series of questions was propounded to each of the defendants pertaining to their capitalization, construction, operation, value and general conduct of their business as common carriers in relation to traffic wholly within the State. The defendants were requested to furnish statements showing the actual amount of freight and passenger traffic in Kentucky, both intrastate and interstate, the receipts, the cost of operation, and all other operating statistics for the year 1905. After these questions were propounded the defendants represented to the Commission that to furnish this information for the entire year would cause a delay of nearly twelve months and involve a vast amount of labor and expenditure of a large sum of money. It was therefore, agreed that four representative months should be selected, and that the information called for should be esti-
33 mated for the entire year upon the showing for the months so selected. The defendant, the Louisville & Nashville Railroad, operating the largest mileage in the State, 1,265 miles, supplied the required information in greatest detail, though by no means as full and satisfactory as might have been expected, while the other defendants failed to furnish the information requested in such form and extent as to equal in value that furnished by the Louisville & Nashville. Indeed, in the whole conduct of this case, the burden of justification laid upon all the defendants has been largely borne by the Louisville & Nashville Railroad.

A number of extended hearings have been had, and each defendant has been given the widest latitude and the fullest opportunity to justify the rates in issue, and all have been urged to furnish to the Commission all facts having a tendency to throw light upon the subject and to facilitate bringing out everything pertinent to the inquiry.

The Commission understands that the theory of the defense of each of the defendants, and particularly that of the Louisville & Nashville Railroad, is based upon the plan which seems to have been agreed upon by complainants and the railroads in the case of Smyth *v.* Ames, wherein the percentage of operating expenses to gross receipts in Nebraska was used to measure the cost of doing all the business. The defendants herein have fallen into the same error that was committed in the Nebraska case, as we shall hereinafter endeavor to demonstrate. However, certain general rules or principles are stated by the Supreme Court of the United States in the cases of Smyth *v.* Ames, 169 U. S., 466, and the Minneapolis & St. Louis Railroad Co. *v.* Minnesota, 186 U. S., 267, and which, taken together, appear to embrace the following propositions:

1. The value of the property used by the carrier in the service must be ascertained, or, at least, justly estimated.

2. While the amount and value of the stock and bonds must be considered, such amount and value are in no way conclusive upon

the question of the actual property value, as the amount and market value of stocks and bonds can only bear upon that question by way of comparison. The actual property value is the cost of reproduction with such deductions therefrom as may be necessary to represent depreciation and thereby indicate the present condition
34 of the property. If the actual property value is independently determined, that value can not be increased or decreased by the amount of securities the company has seen fit to issue.

3. A sufficient return from operation must be allowed to provide for necessary operating expenses and for taxes as a current yearly charge, and the operating expenses include such renewals and repairs as are necessary to keep up the property.

4. While the allowance should be made to pay a proper return upon the ascertained fair valuation of the property used in the service involved, it must always depend upon the circumstances of the road, manner and method of its operation, the character and amount of the traffic involved, and the extent to which the question is affected by the paramount right of the public to enjoy reasonable transportation charges.

These principles are all definitive of the prohibition in the Federal Constitution that no person shall be deprived of his property without due process of law or be denied the equal protection of the laws. While this restriction exists and must not be invaded, the decisions of the court of last resort give finality to the action of the State, acting through its Legislature, or a commission exercising properly delegated powers.

It was apparently contended in the Smyth-Ames case on behalf of those attacking the Nebraska rates fixed by the Legislature, just as it is here, that it cost from 10 to 25 per cent. more to conduct the purely intrastate business than it did to conduct the average of all business within the State, and that this excess cost or per cent. should be added to the proportion of operating expenses to gross receipts for all traffic to indicate the cost to the carrier for the intrastate business. But it does not appear that this contention was seriously disputed or opposed in any such way as to attract the attention of the court. In other words, this theory for ascertaining the cost of doing the State traffic seems to have been conceded by counsel for the State as well as for the railroads in the Nebraska case. The only point of difference regarding this proposition seems to have been that counsel for the State of Nebraska contended that the gross receipts and the operating expenses from all traffic within the State of Nebraska should be considered, whereas the contention of the attorneys for the railroad was that only the purely State
35 traffic should be considered without reference to what the roads earned upon interstate traffic, or what it cost to produce the interstate traffic. It may be true that the rates charged on the purely State business in Nebraska may have been already so low that taken in gross as represented in total earnings from that business and compared with the actual expenses for doing the intrastate business, the percentage of these expenses to these earnings was, in fact, at least 10 per cent. more than the percentage of operating expenses to earnings from all traffic.

However this may be, we are of the opinion that the theory of those acting for the carriers in the Nebraska case, as is the theory advanced by council in the case at bar, that the percentage of operating expenses to gross receipts represents cost, was, and is, wholly untenable.

The answers and statements made by the defendants embrace claims of greater cost of operation for the purely State freight traffic ranging from 10 to 25 per cent. *above the average cost of doing all* the State and interstate business of Kentucky on their respective lines. The defendants have insisted upon a method of stating this increase cost which calls for discussion of this opinion. The Louisville & Nashville, though doing a much larger State freight business than any other carrier in Kentucky; and whose aggregate traffic also greatly exceeds that of any other defendant, asserts that the greater cost of doing the State freight business amounts to 25 per cent., and in stating its claim this company takes the percentage of its total operating expenses to total earnings in Kentucky, State and interstate included, which is reported as 69.16 per cent. and adds 25 per cent. thereto to cover the cost of the State business. This amounts to 94.16 per cent. of the total earnings from intrastate freight in Kentucky. And to this it also adds a proportion of the State taxes amounting to 3.42 per cent., giving a total of 97.58 per cent. of the gross earnings on State freight as its asserted cost of carrying such freight.

The fallacy of these claims lies in the fact that 69.16 per cent. does not stand for total cost at all, nor for any part of the cost. The factor 69.16 simply represents the relation between the total cost expressed in dollars and cents and the total receipts expressed
36 in dollars and cents. The cost and the earnings may both be high or both be low, and yet the same relation may exist. The cost of doing a particular part of the whole traffic may be more than the average cost, and yet the per cent. of that cost to high earnings on that particular traffic may be less than the percentage of the whole cost to the gross earnings. The expense, or cost, to the carrier of a given amount of transportation has no necessary connection with the earnings, or profits derived from that transportation. Since the cost, either total or average, is ascertainable solely from its own elements, it can never be expressed by percentage.

Suppose a line of road carried for a given period only three tons of freight and no passengers, its total operating charge being applicable to the earnings of those three tons, and assume the following costs and charges for each ton:

A. One ton, cost.....	70 cents.	Earnings or charge.....	90 cents.
B. One ton, cost.....	60 cents.	Earnings or charge.....	80 cents.
C. One ton, cost.....	20 cents.	Earnings or charge.....	80 cents.
Three tons, cost.....	$1.50.	Total earnings or charges.	$2.50

The percentage of the operating expenses, or total cost, to the total or gross earnings would be ($1.50 divided by $2.50) 60 per cent.

The general or average cost would be ($1.50 divided by 3), 50 cents per ton. Now, suppose it is desired to state by percentage how much more "ton A cost than the general or average cost of 50 cents. Knowing the cost of "ton A" to be 70 cents, and the general cost to be 50 cents, it is readily found that the difference is 40 per cent. It can, therefore, be claimed, and by correct mathematics demonstrated, that "ton A" cost the carrier to transport it, 40 per cent. more than the general average cost.

Now, if it is desired to state by percentage the cost of "ton A" (70 cents) to the earnings or charge for the transportation (90 cents), the percentage is easily found by dividing 70 cents by 90 cents, with a result of 77.77+per cent., or 17.77+per cent.
37 in excess of the 60 per cent. relation of total expenses to gross earnings.

In the same way, and by the same rule of computation, "ton C," which cost the carrier only 20 cents to transport and yield an earning charge of 80 cents, shows a percentage of cost to the earning charge of only 25 per cent., or 35 per cent. less than the 60 per cent. relation of the total expenses to gross earnings.

If, instead of ascertaining the true percentage of cost to the earning charge for *ton* "ton A" to be 77.77+per cent., a claim is set up that "ton A" costs 40 per cent. more than the general or average cost, and should on that account be added to the percentage of total operating expenses to gross earnings (60 per cent.), the addition makes the claimed cost of "ton A" (40 per cent. plus 60 per cent.) 100 per cent. and consequently that "ton A" was carried without any profit whatever.

Carrying the illustration to its logical conclusion, the same comput-tion must be made for "Ton C," which cost 20 cents to transport, and 30 cents less than the average or general cost of 50 cents. This difference of 30 cents is 60 per cent. of the general or average cost. If the cost above the general average or average cost of "ton A" is to be added to the percentage of total operating expenses to gross earnings (60 per cent.), then for "ton C" the cost of its transportation below the general or average cost must be deducted from the percentage of total operating expenses to gross earnings (60 per cent.). As the cost of "ton C" is 60 per cent. less than the general or average cost, it follows, by this rule, that it costs nothing whatever to transport "ton C," and that the charge received for its earnings was all profit. The foregoing illustration, or example, we think, puts before the mind in the simplest form the wide distinction between actual cost or actual general cost on the one hand, and on the other hand percentage or total cost to total earnings, and shows, *reductio ad absurdum*, the total inadmissibility of the defendants' claim for a minimum cost to it for doing the intra-state Kentucky business represented by adding 25 per cent. to 69.16 per cent. (the percentage of all expenses to all earnings) and making a total of 94.16 per cent., to which it adds taxes, 3.42

per cent. asserts a total cost of that business of 97.58 per cent. A claim of 28 per cent. additional and on this basis, instead of 25 per cent. would have extinguished every vestige of profit and put it in the position of transporting the large intra-state traffic in Ken-
38 tucky at a positive loss, thereby adding unjustly to the burden of the interstate business.

The examples above given show that the ratio of operating expenses to earnings is in no sense the statement of the actual cost, and the cost can not, viewed by itself, be expressed by percentage at all. Whatever the facts as to the actual cost may have been in the Nebraska case, it is, we think, quite clear that in this case the cost is one thing and the percentage or ratio of expenses to earnings is an altogether different thing, and that neither can be used to express or indicate the other. It is not too much to say of the Nebraska case that the contentions of the attorneys for the State were directed chiefly to establish the proposition that the action of the State could not be declared invalid unless the rates fixed should result in a loss from the operation of the road in all business, interstate as well as State, and that the assertion of the State's authority played a principal part in their arguments, resulting possibly in failure to analyze the testimony or to supply necessary testimony on behalf of the State.

With all this, however, the Kentucky Commission has nothing to do. Whether the theory of the defense as applied to the facts of the case is correct or incorrect, and what the actual situation is, are the chief matters for determination in respect of cost. That such theory of the defense is altogether inadmissible is plain from the foregoing analysis.

We are of the opinion that the term or factor used by the defendants for the purpose of stating the cost of doing the State freight business and all statements submitted which are based upon the use of that term or factor, can not be accepted.

At the request of the Commission, the defendant, the Louisville & Nashville Railroad, submitted a statement showing in detail its apportionment of operating expenses between passenger and freight business. We have endeavored to make a fair analysis of this statement, in order to arrive at a fair approximation of the cost to that defendant for doing the freight service in Kentucky during the year 1905, upon a ton-mile basis, which is the correct basis, and have endeavored to so apportion this cost as to show the relative cost per ton-mile of intra-state and interstate freight traffic. This analysis shows that there is properly chargeable to such freight traffic the sum of $6,535,753.09, of which there is chargeable to haulage or transportation proper, $5,014,823.22, and to services other
39 than haulage or transportation $1,520,929.87. The sum total of the items charged against haulage, is $5,014,823.22, is fairly apportionable between State freight and interstate freight upon the basis of ton-miles of haul of each, while the sum total of all other items, $1,520,929.87 is fairly apportionable between these two classes of freight upon the basis of tons of each.

The total number of tons of freight carried, both State and inter-

state, within the State of Kentucky during the year in question is, according to the returns of the defendant, 9,358,270, and the total number of ton-miles of transportation during the same period within the State of Kentucky is 1,291,340,617. The average haul of State freight was 96.97 miles. The average haul of interstate freight was 148.82 miles. Dividing that portion of the charge, $1,520,929.87, the amount to be apportioned upon the basis of tons, by the total number of tons, 9,358,270, gives an average charge per ton for station, loading and unloading, advertising, damage, and the like, *i. e.*, for all services except haulage, of 16.25 cents. This charge being divided by the average haul of the State traffic (97.96) gives the corresponding charge per ton mile against State traffic on account of all services except haulage, amounting to .1659 cents. Dividing the same average charge per ton by the length of haul upon the interstate traffic, 148.82 miles, gives the average charge for this portion of the interstate service, .1092 cents.

The total charge for haulage, $5,014,823.22, divided by the number of ton-miles of haul, which is 1,291,340,617, gives the haulage charge per ton-mile, .3884 cents. Adding to this for the State traffic .1659 cents, gives the fair estimated cost of all services for State traffic per ton-mile, .5543 cents, while in like manner the fair estimated cost per ton-mile of interstate traffic is .4976 cents (the sum of .3884 cents and .1092 cents), thus showing that the fair estimate of the cost of conducting the State traffic per ton-mile is 11.4 per cent. higher than that of conducting the interstate traffic.

On the other hand, the earnings per ton-mile of State traffic are 1.307 cents, while those per ton mile of interstate freight are only .759 cents, showing that the gross profit per ton-mile of State freight is .753 cents as against .261 cents gross profit per ton-mile on interstate freight; so that at the rates now in force the gross profit per ton-mile on State traffic is nearly three times as great as that on interstate freight.

It will also be observed that where the State traffic costs
40 per ton-mile .5543 cents and brings in earnings of 1.307 cents per ton-mile, the operating ratio on the State traffic is 42.40 per cent., while on the interstate traffic, with a cost per ton-mile of .4976 cents and earnings per ton-mile of .759 cents, the operating ratio is 65.57 per cent.

The estimated valuation submitted by the Louisville & Nashville as showing the actual present value of the property is the only valuation shown, although this evidently contains a number of items open to serious question. This valuation, which applies to all the property in Kentucky and includes equipment as well as the physical property, is estimated at $70,530,727.91. The present supply of capital seeking investment is such that bonds upon railway property like that of the defendant can readily be marketed upon the basis of from 4 to 4½ per cent. annual return. Stock shares upon similar property can be readily marketed upon the basis of not to exceed 4 to 5 per cent. annual return, and an addition on the whole actual capital of about 1 to 1½ per cent. is usually ample allowance for accumulating surplus. The Louisville & Nashville stock

now sells currently at from 140 to 150, and is considered upon the market as fairly certain to yield 6 per cent. dividends, making the annual return upon the investment range from 4 2-7 to 4 per cent. That is to say, the investor who buys a share of Louisville & Nashville stock and pays for it $150 does so upon the expectation of deriving from it an annual dividend of $6, which is 4 per cent., upon his investment. He thus says that he considers, under all the circumstances, that 4 per cent. per annum is a fair rate of annual return upon the investment and one that he is willing to accept.

The annual addition to surplus in the Louisville & Nashville Railroad Company is somewhat less than the amount paid out in dividends, having been for the year ended June 30, 1905, about nine-tenths, and for prior years still less, and such devotion of income to surplus more than sufficiently insures the payment of dividends. It has, in fact, resulted in the accumulation of a surplus of undivided profits, beginning with June 30, 1894, and ending on June 30, 1905, which amounts to $14,899,106. This alone is more than sufficient to pay 6 per cent. dividends for four years. To obtain on this basis the average percentage by which to compute the annual allowance for the actual valuation, we take, on account of the funded debt, 2-3 of such capital at 4.25 per cent., which equals 2.83 per cent., on account of stock, 1-3 of such capital at 4.30 per cent.
41 which equals 1.43 per cent.; on account of accumulation and maintenance of surplus, an allowance of 1.30 per cent. is ample. These figures added together give a percentage of 5.56 per cent. and indicate that an allowance of 5.6 per cent. on account of charges upon capital is extremely liberal. This applied to the carrier's estimate of actual valuation of its Kentucky property, gives an annual charge on account of valuation, amounting to $4,450,488.75, including taxes which are stated to be $500,752.75.

To apportion this annual charge on account of valuation, first, as between the State and interstate passenger and freight business, and second, as between the State passenger and freight business, and do so with fair regard to the carrier's interests as well as those of the public, is a task of no little difficulty and one which we are not advised has been attempted heretofore in any similar case in any State, nor have we been assisted in this respect in any degree by the defendant carriers. We have before us simply the total actual valuation of the property in Kentucky as estimated by the carrier's consulting engineer. We have first had to determine the proper annual charge to be allowed for such valuation, and in doing so we have taken into account the market value of the carrier's stock and bonds and the maintenance of its surplus. Now, how shall this Commission, guided by no precedent, apportion this current annual charge of (in round figures) $4,450,500 and arrive at the proper portion of that charge to be laid against the State freight traffic of the defendant in Kentucky. Certainly neither gross earnings nor net earnings can be a satisfactory basis of apportionment of these charges for this purpose, particularly where the purpose of the apportionment is to determine the propriety of the rates from which these gross earnings and net earnings result.

In this case the earnings result from the rates in question. This annual charge for valuation is in a sense part of the carrier's cost, and to attempt to justify the apportionment of costs by the earnings resulting from rates, and then to justify the rates by the apportionment of costs based on the earnings resulting from the rates, would clearly be reasoning in a circle. Nor can any suitable basis for apportionment of this annual charge on account of valuation, be derived from transportation statistics relating to passengers and freight, for the obvious reason that there is no common transportation unit, except the train-mile or car-mile, and the use of the train-mile or car-mile would give no help in apportioning between State freight and interstate freight, because no trains are devoted solely to
42 either class of freight, nor is any considerable number of cars assigned exclusively to either class of freight.

Plainly, then, we have left only the operating expenses as a basis of apportionment. The operating expenses for all traffic in Kentucky are reported to be $10,127,126, the annual charge on account of valuation of $4,450,500 is 43.95 per cent. of the reported total cost of operation. The operating expenses chargeable against State freight, as made up from the figures furnished by the carrier are $1,235,023. Apply this factor of 43.95 per cent. to the estimated cost to the carrier of doing the State business gives $542,744 as the fair total charge to be made against the State traffic on account of actual valuation including taxes. Adding this sum $542,744 to the estimated operating expenses, $1,235,023, amounts to $1,777,767. This sum represents the operating expenses of the carrier on the State traffic in Kentucky in 1905, and a fair return to that carrier upon the use of its property in the conduct of that business for that year. This amount includes not only the fairly apportioned cost of operation and taxes, but also net earnings of 5.6 per cent. on the actual value of the property. It also includes, what have not been heretofore mentioned, a liberal allowance (more than 13 1-3 per cent. of reported operating expenses), out of which to make permanent improvements to the property, and a considerable sum amounting to $259,842.46 wrongfully charged against Kentucky in the statement of salaries paid to general officers and general office clerks. The salaries and wages paid to all general officers and general office clerks whose headquarters are at Louisville, despite the fact that their services are in large part on account of parts of the system, outside of Kentucky, were charged by the carrier wholly to Kentucky. We think these salaries and wages should be apportioned upon no higher basis than the average percentage shown for wages paid to other officers and other employés. The actual amount exacted by the Louisville & Nashville Railroad Company for the State freight service over its lines is $2,552,273.62. This exceeded the allowance above made, namely, $1,777,767.79, by $774,506.63.

The Commission does not of course, undertake to say that the computations, the results of which are hereinbefore set forth, are mathematically accurate, for it is universally conceded that any exact statement of the cost to a carrier for performing its freight service, as compared with its passenger service, or for performing a part of the freight service as compared with the remainder, can not be made

43 The commission has merely done the best it could with the figures and facts before it, but it has endeavored in all its computations to make the most liberal allowance for actual valuation. Yet, with all this, we have a result showing charges by this carrier for intrastate traffic within the State of Kentucky, which are more than $774,000 in excess of just and reasonable rates.

On account of the failure of the other defendants herein to furnish the data called for, the Commission has been forced to use that furnished by the Louisville & Nashville Railroad alone in making its analysis and, aside from the annual reports made by each of the defendants as to their earnings, very little information has been furnished by the other defendants that would be of any assistance to the Commission in making a similar analysis for each of them. The accounts of the railroads in Kentucky are not kept so as to show a separation of their intrastate and interstate earnings and operating expenses, and when called upon by the Commission to give this information they were forced to resort to the original way bills on file in their main offices and much delay was thereby occasioned. As an illustration of the enormous task which would be required to make a complete showing of all these earnings and operating expenses separately, it may be noted that for the Louisville & Nashville Railroad alone it would necessitate a separation and inspection of more than 250,000 way bills per month. As stated, the Commission was compelled to accept this data for four representative months, and the railroads were required to employ an extra force of clerks, in order to tabulate it, and when the information was furnished it was altogether unsatisfactory to the Commission as well as to the roads themselves. The Commission was very much surprised to see the very meagre showing made by each of the railroads regarding their intrastate traffic. It is not possible in this opinion to take up all these matters in detail. It is interesting, however, to note the several answers made to Question No. 28, "State Freight Earnings per mile of road in Kentucky."

Louisville, Henderson & St. Louis R. R.	$1,069 81
Illinois Central R. R.	1,435 62
Cincinnati, New Orleans & Texas Pacific Ry.	873 78
Southern Railway in Kentucky	1,728 67
Chesapeake & Ohio Railway	1,837 72
Louisville & Nashville R. R.	2,017 24
Lexington & Eastern Ry.	1,837 72
Louisville & Atlantic Ry.	1,886 11

44 When it is recalled that the gross receipts per mile for the year indicated, upon the Louisville & Nashville Railroad for all traffic in the State of Kentucky was $11,567 and that of the Illinois Central Railroad $10,932, the showing made by them as above stated as to their earnings per mile on intra-state freight is, to say the least, somewhat remarkable.

Other answers and statements might be taken up in detail and referred to, but, in view of the conclusions reached by the Commission, it is not deemed necessary to do so. Primarily all local rates

are made upon a mileage scale. Each road has its own scale of rates made upon a mileage basis. These rates are departed from where circumstances and conditions in the opinion of the carrier warrant such departure in lowering the rates shown by this scale. An examination of these various mileage scales discloses the fact that different maximum rates have been adopted by the several defendants. We find that the scale of rates used by the defendants the Cincinnati, New Orleans & Texas Pacific Railway, are, as a rule, the lowest maximum rates of any of the defendants. It is also found that the Louisville & Nashville Railroad on its Kentucky Central Division has departed from its regular mileage scale and, on account of competition with the Cincinnati, New Orleans & Texas Pacific, the latter company's rates are in effect upon the Kentucky Central Division. We also find that the mileage scale of rates made by the Southern Railway in Kentucky are approximately the same as those upon the Cincinnati, New Orleans & Texas Pacific, while those upon the Illinois Central are much higher than those of either of the aforesaid defendants. Considerable irregularity prevails in some of these scales. We, however, find that the scale of the Louisville & Nashville Railroad as shown in its local freight tariff designated "Table A," is, to say the least, more uniform, but we are of the opinion that the rates therein shown for all distances, under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M and N, to and from all points wholly within the State of Kentucky are extortionate, unjust and unreasonable. It is, therefore, Ordered, That said defendant, the Louisville & Nashville Railroad Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodi-
45 ties to and from points wholly within the State of Kentucky, rates in excess of the rates shown in the following table for the classes and distances therein stated, to-wit:

Distances.	In cents per hundred pounds.												Per bbl.	Per cwt.	Car loads per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
Over 10 miles and not over 15..	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
15 miles and not over 20..	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
20 miles and not over 25..	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
25 miles and not over 30..	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
30 miles and not over 35..	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
35 miles and not over 40..	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
40 miles and not over 45..	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
45 miles and not over 50..	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
50 miles and not over 55..	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
55 miles and not over 60..	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
60 miles and not over 65..	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
65 miles and not over 70..	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
70 miles and not over 75..	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
75 miles and not over 80..	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
80 miles and not over 85..	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
85 miles and not over 90..	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
90 miles and not over 95..	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	8
95 miles and not over 100.	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
100 miles and not over 110..	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
110 miles and not over 120..	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8

120 miles and not over 130..	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
130 miles and not over 140..	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
140 miles and not over 150..	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
150 miles and not over 160..	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
160 miles and not over 170..	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
170 miles and not over 180..	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
180 miles and not over 190..	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
190 miles and not over 200..	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
200 miles and not over 210..	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
210 miles and not over 220..	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
220 miles and not over 230..	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
230 miles and not over 240..	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
240 miles and not over 250..	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
250 miles and not over 275..	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
275 miles and not over 300..	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
300 miles and not over 325..	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
325 miles and not over 350..	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
350 miles and not over 375..	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
375 miles and not over 400..	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
400 miles and not over 425..	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
425 miles and not over 450..	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19

Provided, however, That where said defendant, the Louisville & Nashville Railroad Company has in effect a tariff, or tariffs of rates, upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in
46 said Maximum Table of Rates, and herein designated "maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," said defendant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs.

The Commission is further of the opinion that the Maximum Mileage Scale of Rates published in Nashville, Chattanooga & St. Louis Railway Company's Local Tariff Number 7, effective May 1, 1900, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, L, M and N, are extortionate, unjust and unreasonable in so far as same are in excess of the rates herein fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company." It is, therefore, Ordered, That the said defendant, the Nashville, Chattanooga & St. Louis Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky, rates in excess of the rates shown in said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," and for the classes and distances therein stated.

Provided, however, That where said defendant, the Nashville, Chattanooga & St. Louis Railway Company has in effect a tariff, or tariffs, of rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The commission is further of the opinion that the maximum mileage scale of rates published in the Illinois Central Railroad Company's Local Freight Tariff No. A-1045, effective December 2, 1905, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, K, L, M, N, and O, are extortionate, unjust and unreasonable in so far as same are in excess of the rates hereinafter fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company." It is therefore, Ordered, That said
47 defendant, the Illinois Central Railroad Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky rates in excess of the rates shown in the following table for the classes and distances therein stated, to-wit:

Distances.	In cents per hundred pounds.												In cts. per bbl.	In cts. per 100 lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	4	4	3	2	2
Over 10 miles and not over 15..	12	10	10	9	8	7	7	7	5	5	7	7	10	5	5	4	3	3
15 miles and not over 20..	16	14	12	10	10	9	9	9	6	6	9	9	12	6	6	5	4	4
20 miles and not over 25..	17	15	13	11	11	10	10	10	7	6	10	10	14	7	7	5	4	4
25 miles and not over 30..	20	17	15	13	12	11	11	11	8	6	11	11	16	8	8	5	5	5
30 miles and not over 35..	22	19	17	14	14	13	13	13	8	7	13	13	16	8	8	6	5	5
35 miles and not over 40..	24	20	18	16	15	14	14	14	9	7	14	14	18	9	9	6	5	5
40 miles and not over 45..	26	23	20	17	17	16	16	16	10	8	16	16	20	10	10	6	5	5
45 miles and not over 50..	28	24	21	19	18	17	17	17	11	8	17	17	22	11	11	7	5	5
50 miles and not over 55..	29	26	23	20	19	17	17	17	11	8	17	17	22	11	11	8	5	5
55 miles and not over 60..	31	26	23	21	20	18	18	18	12	8	18	18	24	12	12	9	6	6
60 miles and not over 65..	32	28	25	23	20	19	19	19	13	9	19	19	26	13	13	9	6	6
65 miles and not over 70..	34	29	26	23	21	20	20	20	13	9	20	20	26	13	13	10	6	6
70 miles and not over 75..	35	31	27	24	22	20	20	20	14	10	20	20	28	14	14	10	7	7
75 miles and not over 80..	37	32	28	25	23	21	21	21	14	11	21	21	28	14	14	11	7	7
80 miles and not over 85..	38	33	29	26	23	22	22	22	14	11	22	22	28	14	14	11	7	7
85 miles and not over 90..	40	34	30	26	24	23	23	23	14	11	23	23	28	14	14	11	8	8
90 miles and not over 95..	41	35	31	27	24	23	23	23	14	11	23	23	28	14	14	11	8	8
95 miles and not over 100..	41	35	32	28	24	23	23	23	15	11	23	23	30	15	15	11	8	8
100 miles and not over 110..	42	36	32	29	25	23	23	23	15	11	23	23	30	16	16	12	8	8

Distances.	In cents per hundred pounds.												In cts. per bbl.	In cts. per 100 lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
110 miles and not over 120..	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8
120 miles and not over 130..	45	39	35	31	27	25	25	25	16	12	25	25	32	17	17	13	9	9
130 miles and not over 140..	47	40	35	32	28	26	26	26	17	13	26	26	34	18	18	13	9	9
140 miles and not over 150..	48	41	37	33	29	27	27	27	17	13	27	27	34	19	19	14	10	10
150 miles and not over 160..	50	43	38	34	30	28	28	28	17	14	28	28	34	20	20	14	10	10
160 miles and not over 170..	51	44	39	35	32	29	29	29	17	14	29	29	34	20	20	14	11	11
170 miles and not over 180..	53	45	40	36	32	29	29	29	18	14	29	29	36	21	21	15	11	11
180 miles and not over 190..	54	47	41	37	33	30	30	30	18	14	30	30	36	22	22	15	11	11
190 miles and not over 200..	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12	12
200 miles and not over 210..	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12	12
210 miles and not over 220..	59	50	43	39	35	32	32	32	20	15	32	32	40	24	24	17	13	13
220 miles and not over 230..	60	52	44	40	36	33	33	33	20	15	33	33	40	25	25	17	13	13
230 miles and not over 240..	62	53	44	41	37	34	34	34	20	16	34	34	40	26	26	17	14	14
240 miles and not over 250..	63	54	45	41	38	35	35	35	20	16	35	35	40	27	27	17	14	14
250 miles and not over 275..	65	56	46	42	38	35	35	35	21	17	35	35	42	29	29	18	14	14
275 miles and not over 300..	68	58	47	43	39	36	36	36	21	17	36	36	42	29	29	19	15	15
300 miles and not over 325..	70	59	47	44	40	37	37	37	22	17	37	37	44	30	30	20	16	16

Provided, however, that where said defendant, the Illinois Central Railroad Company has in effect a tariff, or tariffs, of rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated "Maximum Rates, Kentucky
48 Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The Commission is further of the opinion that all rates now in effect upon the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway in Kentucky, as shown by their respective tariffs and mileage scale of rates on file in this office, respectively, to-wit: Cincinnati, New Orleans & Texas Pacific Railway Company's Local Mileage Tariff Number 8, effective January 1, 1906, and Southern Railway Company in Kentucky's Local Tariff Number 4, effective February 27, 1905, where the same are in excess of the mileage scale of rates hereinbefore fixed for the defendant, the Louisville & Nashville Railroad Company and herein designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company," are hereby declared to be extortionate, unjust and unreasonable. It is, therefore, Ordered, That said Cincinnati, New Orleans & Texas Pacific Railway Company and said Southern Railway Company in Kentucky be, and they are, hereby forbidden to charge, collect or receive for the transportation of commodities, rates in excess of those herein permitted to be charged by said Louisville & Nashville Railroad Company as shown by said Standard Local Scale of Rates.

Provided, however, That where either of said defendants, the said Cincinnati, New Orleans & Texas Pacific Railway Company or said Southern Railway in Kentucky, now has in effect rates lower than those fixed by said standard scale, said defendants shall not charge, collect or receive rates in excess of said lower rates as now published by said defendants respectively.

In view of the fact that the defendant, the Chesapeake & Ohio Railway Company, uses what is known as the "Official Classification," which is entirely different from the Southern Classification now in use by nearly all of the railroads in the State of Kentucky, and not being able at this time to assimilate said classifications, or to make an accurate comparison thereof, the Commission does not feel warranted at this time in making a mileage scale of rates or a classification for the use of the said Chesapeake & Ohio Railway Company. It is, however, of the opinion, and it is now Ordered, That said Chesapeake & Ohio Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation
49 of commodities, rates in excess of those herein permitted to be charged by the defendant, the Louisville & Nashville Railroad Company, as shown by said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company." Said Chesapeake & Ohio Railway Company may assimilate its classification with that of the Southern Freight Classification, and exceptions thereto, now in use

by said Louisville & Nashville Railroad Company upon the basis heretofore adopted and now in use by said Chesapeake & Ohio Railway Company for such assimilation as shown by its tariffs now on file in this office.

This Commission has not yet adopted a standard classification for any or all of the railroads in the State, and in the absence of such classification, and for the purpose of effectuating this order, it now hereby adopts the Southern Freight Classification now in effect with the current exceptions issued by the various railroads, defendants hereinbefore named, applicable to Kentucky traffic, and the Commission reserves the power to revoke, change or modify this order and to change or modify any or all of said rates, classifications and exceptions thereto, and reserves further the power to make and issue a classification of its own for the use of any or all of said defendants; and it appearing to the Commission from tariffs now on file in this office that many of the commodities assigned to the various classes stated in the Maximum Rates, Kentucky Railroad Commission's Standard Tariff Nos. 1 and 2, herein adopted, are transported by the respective railroads on commodity rates, or rates less than those fixed by said standard tariffs, it is now Ordered, That said commodity or such other rates as are lower than those fixed by said Railroad Commission's Standard Tariffs Numbers 1 and 2, shall remain in effect as maximum rates until otherwise ordered by this board.

All other questions herein are reserved for future determination, and the Commission will, from time to time, make and issue such orders upon all matters herein as may be deemed just and proper.

It is further Ordered, That each of the defendants be furnished with copies of this opinion and order, and copies of said Maximum Rates, Kentucky Railroad Commission's Standard Tariffs Nos. 1 and 2 attested by the Secretary of the Commission.

C. C. McCHORD, *Chairman;*
A. T. SILER,
McD. FERGUSON,
Commissioners.

A copy.
Attest:

MOSES R. GLENN,
Secretary of the Railroad Commission.

50 The foregoing exhibit is endorsed in words and figures as follows, viz: Filed 25, 1906, W. G. Chapman, Clerk.

On the same day, to-wit, on the 25th day of July, A. D., 1906, a subpœna in chancery was issued on the foregoing bill of complaint, which said subpœna is in words and figures as follows, viz:

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

The President of the United States of America, to the Marshal of the Eastern Kentucky District, Greeting:

You are hereby commanded to summon Charles C. McChord, Adam T. Siler, and McDougal Ferguson, constituting the Railroad Commission of the State of Kentucky, to appear before our Circuit Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Frankfort, on the first Monday in September next, to answer a bill in equity, exhibited against them in our said Court, by Southern Railway in Kentucky and this they shall in nowise omit, under the penalty of four hundred dollars; and have you then there this writ.

In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America,
[SEAL.] hath caused the seal of our said Circuit Court to be hereunto affixed, at the Clerk's Office of said Court in Frank-
51 fort, this 25th day of July, A. D., 1903, and in the 131st year of our Independence.

Attest:

WALTER G. CHAPMAN, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in the Clerk's Office of said Court, on or before the first Monday in September, 1906; otherwise the said Bill may be taken *pro confesso.*

WALTER G. CHAPMAN, *Clerk.*

The Marshal's Return on the foregoing Subpœna is as follows, viz:

Received this Subpœna in Chancery at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to each of the within named defendants at the following times and places, viz.: to McDougal Ferguson, on July 26th, 1906, at Frankfort, Ky.; to Adam T. Siler, on July 27th, 1906, at Williamsburg, Ky.; to Charles C. McChord, on August 17th, 1906, at Frankfort, Ky.

Witness my hand this the 17th day of August, 1906.

S. G. SHARP,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

The Clerk's endorsement on the foregoing Subpœna is as follows, viz: Returned & filed Aug. 22, 1906, W. G. Chapman, Clerk.

52 On a day following, to-wit, on the 26th day of July, A. D., 1896, a restraining order was made and entered in said cause, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY COMPANY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

The complainant moved the Court to grant to it a preliminary writ of injunction in accordance with the prayer of the bill of complaint, and said motion is now fixed for hearing on the 24th day of September, 1906, at 11 o'clock, A. M., in the Court Room in the City of Frankfort, Kentucky; and it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing of said application for the writ of injunction, unless the said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted, and that the said Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force and effect their order of June 20, 1906, promulgated July 19 or July 20, 1906, reducing the railroad rates of the complainant on intra-state freight between points within the State of Kentucky or putting into force and effect the schedule of maximum rates prepared and promulgated thereunder so far as such rates relate to the railroad of the complainant; and also are restrained and enjoined, individually and jointly as constituting said Railroad Commission, from recommending or causing to be instituted any prosecution by indictment, or other legal proceed-
53 ing, against the complainant or any of its officers, agents or employés, to recover any fine or penalty imposed by Sections 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever, for or on account of complainant's failure or refusal to put into force and effect the Railroad Commission's order aforesaid, or the rates fixed in the schedule of maximum rates prepared thereunder, until the hearing upon the said application for writ of injunction and the further order of the court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of this said motion if they so desire.

Certified copy of said Restraining Order having been placed in the hands of the United States Marshal for the Eastern District of Kentucky for service, the same was returned and filed in the Clerk's Office on August 22nd, 1906, with said Marshal's return thereon as follows:

Received this Restraining Order at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to the within named McDougal Ferguson, at Frankfort, Ky., on July 26th, 1896; and further by delivering a true copy thereof to the within named Adam T. Siler, at Williamsburg, Ky., on July 27th, 1906. Charles C. McChord not found within my District.

Witness my hand this the 27th day of July, 1906.

S. G. SHARP,
U. S. Marshal,
By N. I. McDANIEL, *D. M.*

54 Certified copy of said Restraining Order having been placed in the hands of the United States Marshal for the Western District of Kentucky for service, the same was returned and filed in the Clerk's Office on July 28th, 1906, with said Marshal's Return thereon, as follows:

Received this writ at Louisville, Ky., July 26th, 1906, and executed same by delivering a true copy thereof to Charles C. McChord at 8 o'clock P. M., July 26th, 1906, in Louisville, Ky. This July 26th, 1906.

G. W. LONG,
U. S. Marshal for the Western District of Ky.

On a day following, to-wit, on the 3rd day of September, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY CO. IN KY.
vs.
CHARLES C. MCCHORD ET AL.

Now come Charles C. McChord, Adam T. Siler and McDougal Ferguson, defendants herein, by their attorney, Bennett H. Young, and enter their appearance in the above styled cause.

On a day following, to-wit, on the 24th day of September, A. D. 1906, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

55 No. 544.

SOUTHERN RAILWAY COMPANY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

This cause came on to be heard on the motion for an injunction *pendente lite* and it is now ordered that the restraining order hereinbefore entered be continued as an interlocutory injunction until the final hearing of the cause or until the further order of the court herein, the defendants not objecting to this order on condition that complainant shall stipulate, and said complainant does now so stipulate as follows:

(1) All way-bills made out by it on and after October 1, 1906, on Kentucky intra-state shipments shall show on their face the date, point of origin, point of destination, consignor and consignee, the character of articles consigned for shipment, weight, rate, freight and total charges.

(2) Such way-bills shall be preserved until the final determination of the cause.

(3) There shall be given to each shipper where he prepays the freight, or to the consignee where he pays the freight, a bill of lading, receipt or expense bill showing the date, point of origin, destina-

tion, name of consignor and consignee, character of freight shipped, weight thereof, rate of freight and total amount of freight charges.

(4) The Complainant shall keep all Kentucky intra-state way-bills separate from interstate way-bills and on file in its general offices so separated, to the end that from such way-bills, bills of lading, receipts or expense bills it may be hereafter determined, if such become necessary or expedient, what amount, if any, was charged to each shipper in excess of a lawful rate. This order,
56 however, is not to prejudice the complainant's right to contest, as a matter of law, the claim of shippers to recover of it any excess. And time is given to defendants until November Rules to plead, answer or demur. This order is entered by consent of parties hereto. John W. Ray, Esq., at attorney of this bar, appeared on behalf of the Attorney General of the State and announced that the Attorney General did not consent thereto. The court then announced that it would hear him in regard thereto, but he, not desiring to be heard, the order was entered subject to right of Attorney General, at any time, to move to set aside on due notice to parties hereto.

On a day following, to-wit, on the 5th day of November, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY IN KENTUCKY
vs.
CHAS. C. MCCHORD ET AL.

This day came the defendants, by their solicitors of record, and filed their answer to the bill of complaint herein.

The answer of Defendants to the Bill of Complaint, referred to in the foregoing order, is in words and figures as follows, viz:

57 The Circuit Court of the United States, for the Sixth Circuit and Eastern District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD, MCDOUGAL FERGUSON, and ADAM T. SILER, Railroad Commissioners of Kentucky, Defendants.

Answer.

To the Honorable Judges of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky:

I.

The defendants now and at all times hereinafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and

imperfections in the said bill contained, for answer thereto, or to so much thereof as the defendants are advised it is material or necessary for them to make answer to, answering, say:

II.

The defendants deny that the traffic conducted by the complainant, Southern Railway Company in Kentucky, on its various lines, differs so that upon some of such lines the traffic is much
58 greater than upon others, or is of such a character that the expense of conducting transportation is less upon one line than upon others, or that the traffic is so small upon any of its lines that it is hardly remunerative at all, or that the expense of conducting transportation on any of its lines approximates closely or at all the revenue received by the complainant.

III.

The defendants state that it is true that under Section 209 of the Constitution of Kentucky a commission is to be established, to be known as the Railroad Commission, and to be composed of three commissioners, and that they are the Railroad Commissioners. It is also true that the legislature of the State of Kentucky has passed certain acts, vesting in the Railroad Commission certain powers and imposing upon it certain duties. It is also true that the legislature of the State of Kentucky passed an act which was approved March 10, 1900, and which is contained in what is known as Carroll's Kentucky Statutes, as Section 820-A. It is provided in Section 820-A that:

"When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation com-
59 plained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of hearing the same, also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record-book of their office and signed by the Commission and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise

entered of record. And should said railroad company or corporation of any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction, in any sum not less than two thousand dollars nor more than five thousand dollars."

60 IV.

It is true that Guenther and others made complaint to the Railroad Commission and presented a petition to it, to which a number of railroads were made parties. Afterwards, the Commonwealth of Kentucky presented a petition and was made a party to the proceeding, and made substantially the same averments as were made by Guenther and others. It was averred that the local freight rates from and to local points in the State of Kentucky, as fixed and charged by the railroads, including the complainant, on all classes of freight, were excessive, discriminatory and extortionate; that they were so excessive, extortionate and discriminatory in favor of some local communities as against other local communities that such charges were in violation of law, against public policy, and illegal; that the rates were not uniform; that they did not treat the local communities with fairness or equitably; that the rates were so charged and maintained so as to build up one community at the expense of another. The defendants state that the averments in the complaints of the shippers and Commonwealth were true; that certain of the railroads, including the complainant, did fix and maintain rates of the character described in the complaints; that the local freight rates from and to local points in the State were excessive, discriminatory and extortionate; that the railroads, including the complainant, did discriminate in favor of some local communities against other local communities, and the rates so charged and maintained were in violation of law and against public
61 policy, and hence were illegal. It is further averred that such proceedings were had before the Commission, that the questions were before it as to whether the complainant and other railroads were engaged in making extortionate and discriminatory charges against shippers for carrying freight, and that the complainant and the other railroads had notice of the proceedings, and appeared and made defense to the complaints which were filed before the Commission.

V.

The defendants state that it is true that the Louisville Veneer Mills and several others united in a petition to be made parties to the proceedings instituted before the Commission; that they were residents of Kentucky, engaged in shipping lumber, logs, ties and

all timber commodities from point to point in the State of Kentucky, over the railroads owned, controlled and operated by the complainant and the other railroads against which proceedings were instituted. Defendants aver that the rates and classification on lumber, logs, ties and all timber commodities to and from all points in Kentucky were extortionate, discriminatory and unreasonable, and that this fact was made to appear before the Commission. They deny that the rate on railroad or cross ties from non-competitive points to all other or any points in the State of Kentucky, as fixed by the Commission, amounts to confiscation, or prevents the producer or owner of said railroad or cross ties from getting them to any open market. They aver that the rate fixed by the Commission is reasonable, and not confiscatory in character.

62 VI.

It is true the Commission ordered that the railroads, including the complainant, make their rates on walnut, cherry and cedar lumber no higher than the rates then shown in their published tariffs on oak, poplar and other grades of lumber, and their rates on walnut, cherry and cedar logs no higher than the rates shown in their published tariffs on oak, poplar and other grades of logs, and that said log rate should be no higher than seventy (70) per cent. of their lumber rate so fixed; that the Commission also ordered that the complainant and the other railroads make their rates on cross ties no higher than their rates on lumber thus fixed. Defendants aver that the rates which they ordered should be established and maintained thereafter were only reasonable and fair, and in no wise confiscatory in character.

VII.

Defendants deny the averment that no proof was introduced by any of the complaining parties before the defendants that any rate or rates complained of was unjust, extortionate or unreasonably high, or that no evidence was introduced before the defendants showing the conditions or circumstances surrounding the traffic handled by the complainant, the expense of conducting various classes of traffic, and the character of such traffic, or other evidence from which the defendants could form a judgment that the rates charged by the complainant were unjust, unreasonable or extortionate; but
63 defendants aver that they had sufficient information and evidence before them to enable them to order the complainant to establish and maintain the rates fixed by the Commission.

VIII.

Defendants deny that the effect of the order entered by them will so reduce the revenue to be derived by the complainant from the operation of its freight trains on its intrastate traffic as to make it confiscatory in its character, or deprive the complainant of its property without due process of law, or that its property will be devoted to public use without just compensation. They deny that it was

proper for the Commission, or for the court, to take into consideration the effect of the order upon interstate traffic. The defendants deny that for the year ending June 30, 1905, complainant's total net earnings were only $142,145.88. They deny that complainant's average net earnings for the eleven years ending June 30, 1905, were only $140,446.11. They deny that the cost of reproducing the complainant's property in Kentucky, which is necessarily used by it in its operation as a railway common carrier, would be as much as $5,419,925.00. They deny that its total gross earnings from operation in Kentucky for the fiscal year ending June 30, 1905, were $1,058,015.70. They deny that its operating expenses, including taxes, were $893,244.14. They deny that the operating cost to earn one dollar of revenue was .8443. They deny that its gross earnings
64 from intrastate traffic were only $427,130.85. They deny that the ratio of the intrastate gross earnings to the total gross earnings is only 40.77 per cent. They deny that the total gross earnings from freight for the aforesaid year were only $776,913.70. They deny that the gross freight earnings from intrastate traffic were only $257,902.33. They deny that the ratio of intrastate gross freight earnings to total gross freight earnings is only 30.57 per cent. They deny that the operating cost of earning one dollar of intrastate revenue is largely greater than the operating cost of earning one dollar of total revenue or of interstate revenue. They deny that the net earnings which the complainant derives from intrastate traffic, exclusive of taxes, is only $66,504.28. They deny that the necessary improvements and betterments with which intrastate business should be charged is as much as $17,336.58. Defendants again deny the averment that there was no reason for reducing the complainant's rates, or that there was no evidence tending to show that any one of said rates was either unjust, unreasonable or extortionate. They again deny that the rates fixed and maintained by the complainant were just and reasonable, or that the return to it upon the value of its property was less than it was entitled to receive, or that the reduction made by the Commission is confiscatory in character, or that it is thereby deprived of its property without due process of law, or in violation of the Fourteenth Amendment to the Constitution of the United States or any provision of that instrument.

IX.

The defendants deny the averment that the Commission had no right or authority to make a tariff of rates which would be applicable to each railroad, in so far as such tariff was lower than, or
65 equal to, the rates charged by such road, and to forbid the complainant and the other roads from charging a rate equal to that prescribed in said tariff on all classes embraced therein. The defendants deny the averment that the Commission did not have authority to make an order forbidding the complainant from advancing rates which it had in effect at the time the defendants entered the order to which reference has been made. They deny that the Commission did not have authority to adjudge that the rates then being charged by the complainant on certain products should

not be raised by the complainant. The Commission had before it the question of adjusting the rates, and it had the same right to determine that the rate then prevailing should not be changed as it had to adjudge that the rate on certain commodities should be reduced. They deny that it was the purpose, or is the effect, of the order to fix certain rates for one railroad and lower rates for other railroads, without any regard to, or any inquiry as to, any differences in circumstances or conditions, or that such order was based upon the accident that the tariffs of several of the railroads differed as between themselves. They deny that the order of which complaint is made is special, partial, unjustly discriminatory, or violative of the Constitution of Kentucky, wherein it prohibits special legislation; or that it is taking or applying to public use property without just compensation; or that the order is violative of the Constitution of the United States, in depriving the complainant of its property without due process of law; or that the order denies it the equal protection of the law as guaranteed by the Federal Constitution or any Amendment thereof.

66 X.

They deny that the act under which the defendants proceeded is violative of the Constitution of Kentucky, or of Sections 27, 28, 109 or 135 thereof, or that any powers are vested in said Commission which are not warranted by the Constitution of Kentucky. They deny that the act is violative of the Constitution of the United States, subsection 3, Section 8 of Article I of that instrument, or that it attempts to deal with interstate traffic. They deny that the act is violative of the Constitution of the State of Kentucky, or of Section 1 of Amendment Fourteen of the Constitution of the United States. They deny that the act denies to railroad companies the protection of the law equal to that enjoyed by other common carriers, or that it is violative of Section 17 of the Constitution of the State of Kentucky, or of Article VII or any of the Amendments to the Constitution of the United States, or that the legislature by the act endeavors to impose fines which are excessive.

XI.

In answer to so much of paragraph XII of the bill as defendants deem it necessary to answer, defendants deny that the railroads against which the order does not operate have in force and effect rates higher than those of the complainant, or higher than those prescribed in the order to be observed by the six railroads embraced in the order, or that the rates charged by the said roads against which the said order does not operate are charged under substantially similar circumstances and conditions to any of the
67 roads named in the said order. They deny that the said order is partial, unjust or discriminatory, or beyond the power and authority of the Railroad Commission.

XII.

Defendants deny that their said order and opinion was without authority of law in that, or in any other respect, wherein it was or-

dered that where complainant has in effect a tariff or tariffs of rates upon commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Commission's Maximum Table of Rates designated "Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Railroad Co.," complainant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs. Defendants aver that, under the circumstances, it was entirely proper for the Commission to order the commodity or such other rates as were lower than those fixed by said Railroad Commission's Standard Tariff No. 1, to remain in effect as maximum rates until otherwise ordered by the Commission; that complainant had established and maintained these rates as just and reasonable, and that they were no more than just and reasonable under the circumstances. In addition to its own judgment upon this proposition, the Commission was and is fortified by the complainant's judgment, evidenced by the fact that the complainant made and fixed said rates as just and reasonable; that complainant has not increased these commodity or lower rates or attempted to do so, nor has it made any application to the
68 Commission to have the order changed with reference thereto.

Defendants deny that said commodity or other rates, or any of them, are lower than similar rates in force upon other roads, competitors of complainant in business. Defendants deny that that portion of their said order as undertakes to prohibit complainant from increasing its existing lower commodity rates from what they are to said Commission's Maximum Rates on the classes to which such commodities belong is either null or void.

XIII.

Defendants say that complainants and all other railroad carriers have heretofore adopted a plan for making rates. In accordance with this plan or basis, the many thousands of articles which they are required to transport, and for the transportation of which rates must be made, are classed or grouped in such a way as to bring them together into one or the other of said classes or groups, in order that each class or group may be subjected to the same charge for carriage. A rate is then fixed for each class or group, this being done to facilitate the making of rates, and is but one of the elements and a part of the plan or basis for making same. As shown in complainant's local freight tariffs and in "Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Railroad Co.," complainant had, theretofore, adopted certain classifications or groups, to wit: Numbers 1, 2, 3, 4, 5, 6 and letters A, B, C, D, E, H, F, I, L, M and N. Under these classifications or groups, about three thousand five hundred (3,500) commodities are distributed, and the rate upon each class or group is then fixed
69 as shown in said tariffs, thereby fixing the rate for the transportation of each commodity assigned to the several classes or groups. Defendants did not change complainant's plan or basis for making such rates, but, upon the contrary, adopted and approved the same as the most convenient form and method of making and

fixing said rates, and the plan or basis thus adopted is nothing more nor less than making and fixing the rate. Defendants deny that their power is limited to a case where, upon complaint, or their own motion, after notice and investigation, they find an existing rate is extortionate, they may, in lieu of the particular rate held by them to be extortionate, make, fix and name a rate which they shall determine to be a just and reasonable one for like services thereafter rendered.

XIV.

Wherefore, these defendants having fully answered, confessed, traversed and avoided or denied all the matters of said bill of complaint material to be answered, according to their best knowledge and belief, humbly pray this honorable court to enter its decree that the defendants be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as to this honorable court may seem meet, and in accordance with equity.

BENNETT H. YOUNG,
ROBERT H. WINN,
T. H. PAYNTER,
Attorneys for Defendants.

70 The foregoing answer is endorsed in words and figures as follows, viz: Filed at Rules, Nov. 5th, 1906. W. G. Chapman, Clerk.

On a day following, to-wit on the 3rd day of December, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY COMPANY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

This day came the complainant, by its attorneys of record, and filed its replication herein.

Replication, referred to in the foregoing order, is in words and figures as follows, viz:

71 The Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD, ADAM T. SILER and MCDOUGAL FERGUSON, Individually, and as Constituting the Railroad Commission of the State of Kentucky, Defendants.

Replication.

The Replication of the Above Named Complainant to the Answer of the Above Named Defendants.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly — as in and by its said bill it has already prayed.

HUMPHREY & HUMPHREY,
Attorneys for Complainant.

72 The foregoing replication is endorsed in words and figures as follows, viz: Filed at Rules, December 3rd, 1906, W. G. Chapman, Clerk.

On a day following, to-wit, on the 27th day of February, A. D., 1907, an order was made and entered in said cause, which order is in words and figures as follows, viz:

SOUTHERN RAILWAY COMPANY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

Now upon this day came the Complainant by Humphrey & Humphrey, Counsel, and the defendants, by Bennett H. Young and Thomas H. Paynter, Counsel, and thereupon it is now ordered by the Court as follows:

1. Samuel H. Stone, Esq., is hereby appointed Special Commissioner to take such evidence in this cause as may be offered

by either of the parties hereto, and to make report thereon to the court; and he will take such evidence as may be offered by either of the parties hereto, and report his findings of fact thereon to the court at the earliest reasonable time practicable, together with the evidence in the cause.

2. In taking such evidence the Commission is authorized to employ a competent and reliable stenographer, or stenographers, whose compensation shall be fixed by him, to take down the testimony and reduce the same to writing. And said Commissioner shall have power to appoint such place or places, for the taking of evi-
73 dence as may be convenient to the parties and witnesses. Due notice whereof shall be given to counsel for complainant and defendants.

3. He shall cause such evidence to be transcribed and printed under his supervision, furnishing to the complainant and the defendants copies of the same. The expense of printing shall be taxed as costs and abide the result of this action. He shall fix a time in which the complainant shall take its evidence in chief, and the time in which the defendants shall take their evidence in response, and the time in which complainant shall take its evidence in rebuttal, but shall have power to extend the time fixed by him for the taking of evidence by either party for good cause shown.

4. After the evidence offered by the parties shall have been taken the Commissioner shall make a full report to the Court of his findings upon the facts, and shall cause the same to be printed and copies thereof delivered to counsel for complainant and defendants.

He shall ascertain and find from the evidence introduced the following facts and report them to the court:

(*a*) The original cost of construction of the railroad and properties used by the complainant in the State of Kentucky in the conduct of its business as a common carrier.

(*b*) The amount expended thereon in permanent improvements.

(*c*) The amount, par, and market value of its bonds and stock as of March 1, 1907.

(*d*) The probable present cost of reconstruction and reproduction of the railroad and properties of the complainant, used in its business as a common carrier in the State of Kentucky in the condition in which they now are.

74 (*e*) The present value, as of March 1, 1907, of the rolling stock and equipment used by complainant in its business as a common carrier in the State of Kentucky.

(*f*) The total value of all the properties operated by the complainant in the State of Kentucky, and the value of all such properties devoted to the conduct of intrastate traffic, and the value thereof devoted to the conduct of interstate traffic, respectively, during the year ending June 30, 1905, and the year ending June 30, 1906, and as of March 1, 1907.

(*g*) The gross earnings, per annum, from the operation of complainant's railroads in Kentucky during the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, inclusive; showing, as nearly as practicable, what

part of said earnings is from interstate commerce, and what part from intrastate commerce, stating the amounts derived from intrastate and interstate freight traffic separately from the amounts derived from other traffic.

(*h*) The operating expenses and taxes expended by complainant in Kentucky for the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906 to March 1, 1907, inclusive; showing, as nearly as practicable, what part of said operating expenses and taxes was expended in the conduct of its interstate business, and what part of same was expended in the conduct of its intrastate business.

(*i*) The earnings which would have accrued to complainant for the year ending June 30, 1905, for the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, if the rates promulgated by the defendants by their order of June 20, 1906, had been in effect during said periods.

75 5. Said Commissioner shall report such other facts as may be developed in the evidence which are pertinent to the issues in this cause, and at the request of either party shall make a special finding upon any fact deemed material by such party to any issue herein.

6. The Clerk of this court will furnish the said Special Commissioner with a certified copy of this order and, without further order, turn over to him, taking his receipt therefor, all pleadings and court papers pertaining to this cause.

On a day following, to-wit, on the 11th day of March, A. D., 1907, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

It is ordered by the court that this cause be, and it is hereby, continued until the next regular September Term of the Court.

On a day following, to-wit, on the 2nd day of August, A. D., 1907, an order was made and entered in the case of the Louisville & Nashville Railroad Company *vs.* Charles C. McChord *et al.*, which said order applies to this case, and is in words and figures as follows, viz:

76 LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. MCCHORD ET AL.

This day came Samuel H. Stone, Special Commissioner appointed by the Court to take proof in the several cases, viz: Southern Railway in Kentucky *vs.* Charles C. McChord, *et al.*, Cincinnati, New Orleans & Texas Pacific Railway Co., *vs.* Charles C. McChord, *et al.*, Illinois Central Railroad Company *vs.* Charles C. McChord, *et al.*, and Louisville & Nashville Railroad Company *vs.* Charles C. McChord, *et al.*, and all parties to said actions, by counsel, appearing

before the Court, and it further appearing to the Court that it is necessary that the parties hereto shall make a deposit for the purpose of paying the costs of taking and writing the proof, printing, publishing and all other expenses connected therewith.

It is hereby ordered that all the plaintiffs herein shall pay, together, to Samuel H. Stone, Commissioner, the sum of $1,000, and that the Commonwealth of Kentucky shall pay to Samuel H. Stone, Commissioner, the sum of $1,000.00 said amount to be used in defraying expenses connected with the taking and writing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the court, and all questions as to the taxation of costs are reserved for future orders of the court.

On a day following, to-wit, on the 2nd day of December, A. D., 1907, an order was made and entered in the case of Louisville & Nashville Railroad Co., *et al., vs.* Charles C. McChord, *et al.*, which said order applies to this case, and is in words and figures as
77 follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. MCCHORD ET AL.

This day came Samuel H. Stone, Special Commissioner appointed by the Court to take proof in the several cases, viz: Southern Railway Company in Kentucky *vs.* Charles C. McChord, *et al.*; Cincinnati, New Orleans & Texas Pacific Railway Company *vs.* Charles C. McChord *et al.*; Illinois Central Railroad Company *vs.* Charles C. McChord *et al.*; and Louisville & Nashville Railroad Company *vs.* Charles C. McChord *et al.*, and all parties to said actions, by counsel, appearing before the Court, and it further appearing to the court that it is necessary that the parties hereto shall make a further deposit for the purpose of paying the costs of taking and writing the proof, printing, publishing and all other expenses connected therewith,

It is hereby *ordered*, That all the plaintiffs herein shall pay, together, to Samuel H. Stone, Special Commissioner as aforesaid, the sum of One Thousand ($1,000) Dollars, and that the Commonwealth of Kentucky shall pay to said Samuel H. Stone, Commissioner, the sum of One Thousand ($1,000) Dollars, said amount to be used in defraying expenses connected with the taking and writing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the Court; and all questions as to the taxation of costs are reserved for future orders of the court.

78 On a day following, to-wit, on the 9th day of January, A. D., 1908, an order was made and entered in said cause, which order is in words and figures as follows, viz:

SOUTHERN RAILWAY COMPANY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

This day came the defendants, A. T. Siler and McD. Ferguson, and also came the Complainant, and it appearing from the report of Samuel H. Stone, Commissioner herein, that the defendant, C. C. McChord, had resigned his place as a member of the Railroad Commission of Kentucky, that one W. P. Walton was appointed and served as a member of the Commission until December 10, 1907, when his successor in office, Lew P. Tarlton who had been duly elected as a member of said Railroad Commission at the regular election held on November 5, 1907, duly qualified as such Commissioner; and it also appearing that the defendants, A. T. Siler and McD. Ferguson, had each been re-elected on November 5, 1907, to succeed themselves as members of said Railroad Commission; and upon these facts being suggested it was insisted that this action had abated.

And came the Complainant and moved the Court for leave to file a supplemental bill herein, bringing the said Lew P. Tarlton before the Court and asking a process against him. And the Court being advised, it is now ordered, adjudged and decreed, that the motion of the complainant to file said supplemental bill be sustained and that this action now proceed against the said A. T. Siler, McD. Ferguson and Lew P. Tarlton as members of the Railroad Commission of the State of Kentucky and against the said Railroad Commission; that process issue against the said Lew P. Tarlton; that the temporary injunction heretofore granted herein be and it is so extended as to embrace the said Lew P. Tarlton and to bind and affect him and the other defendants during their new term of office as during their old term of office; subject to the same terms and conditions of the injunction heretofore granted.

79

Then came Llewellyn P. Tarlton in *propria persona* and entered his appearance hereto, and time is given the defendants until the March Rules 1908, to plead, demur or answer.

Supplemental Bill, referred to in the foregoing order, is in words and figures as follows, viz:

In the Circuit Court of the United States, for the Eastern District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The complainant, the Southern Railway Company in Kentucky, comes and now, by way of supplemental bill to its original bill of complaint herein, respectfully shows unto the Court:

80 Since the filing of its original bill of complaint herein, to-wit, in the latter part of November, 1907, the defendant, Charles C. McChord, resigned his office as Chairman and member of the defendant, Railroad Commission of the State of Kentucky, from the Second Commission District, and the Governor of the State of Kentucky thereupon appointed for the remainder of his term one W. P. Walton, in his stead, who duly qualified by taking the oath of office required by law, and served as a member of the defendant Commission until December 10, 1907, when his successor in office, Lew P. Tarlton, who had been duly elected as a member of the defendant Commission at the regular election held on November 5, 1907, in said Second Commission District, duly qualified as such Commissioner by taking the oath of office required by law, and is now the regularly elected, qualified and acting member of the defendant Commission from said Second Commission District.

The Complainant further states that the defendants, A. T. Siler and McDougal Ferguson, were at said regular election on November 5, 1907, duly re-elected as the other two members of the defendant Commission, the former from the Third and the latter from the First Commission District, and thereafter on December 10, 1907, the said Siler and Ferguson duly qualified as such Commissioners by each taking the oath of office required by law, and are now the duly elected, qualified and acting members of the defendant Commission, from said Third and First Commission Districts respectively, having succeeded themselves in office, and have thus been continuously in office from the institution of this suit until the present time.

The complainant further states that said defendant Siler, on or about December 11, 1907, was duly selected as Chairman of
81 the defendant Commission, and is now the duly appointed, qualified and acting Chairman of the defendant Commission. And all said members of said Commission threaten to & will unless enjoined enforce the orders complained of herein.

In consideration whereof complainant prays that the said Lew P. Tarlton, individually, be substituted and made a defendant herein instead of the defendant, Charles C. McChord, and together with the other defendants, A. T. Siler and McDougal Ferguson, as constituting the defendant, Railroad Commission of the State of Kentucky, and that the injunction *pendente lite* heretofore granted against the defendants herein be extended to and against the defendant Tarlton, individually and as a constituent member of the defendant Commission, and that he be required to answer the several matters and things hereinbefore set forth in complainant's original bill, and as particularly as if the same were again here repeated and the said defendant himself interrogated, but oath to the answer of said defendant is hereby expressly waived; and, further, that a writ of subpœna against the said Lew P. Tarlton may issue, commanding him, under a penalty to be fixed therein, to appear before this court on some certain day to be therein named, to answer the premises and abide by and perform such decree as may be passed herein, and that complainant may have such other and further relief, general and special, against the said defendant Tarlton, individually and as a

constituent member of the defendant Commission, as well as against his co-defendants individually, and as the other two constituent members of the defendant Commission, and against the defendant Commission, and their successors in office, as in equity complainant may, on final hearing, appear to be entitled to.

82 SOUTHERN RAILWAY COMPANY IN KENTUCKY,
By HUMPHREY & HUMPHREY,
Attorneys for Complainant.

STATE OF KENTUCKY, *Jefferson County:*

Personally appeared before me, Lilly R. Warren, a Notary Public, duly commissioned, qualified and acting in and for the State and County aforesaid, Alexander P. Humphrey, who being duly sworn by me deposes and says that he is the General Counsel of the complainant, Southern Railway Company in Kentucky, and the chief officer of said Company now in the State aforesaid; that he has read the foregoing supplemental bill and knows the contents thereof, and that the statements therein contained are true, as he believes.

ALEX. P. HUMPHREY.

Subscribed and sworn to before me by said Alexander P. Humphrey, this January 7th, 1908. In Witness Whereof I have hereunto signed my name and affixed my official seal at Louisville in the State aforesaid. My Commission expires January 31, 1910.

LILLY R. WARREN,
Notary Public, Jefferson County, Ky.

The foregoing Supplemental Bill is endorsed in words and figures as follows, viz: Filed Jan. 9, 1908, W. G. Chapman, Clerk.

83 On a day following, to-wit, on the 2nd day of March, A. D., 1908, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY COMPANY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

This day came the defendants, Charles C. McChord, A. T. Siler, McDougal Ferguson and L. P. Tarlton, by their attorneys of record, and filed their joint and several plea to the bill of complaint and supplemental bill of complaint herein.

The joint and several plea of defendants to the bill of complaint and supplemental bill of complaint, referred to in the foregoing order, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort. In Equity.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

The joint and several plea of Charles C. McChord, A. T. Siler, McDougal Ferguson, and L. P. Tarlton, to the bill of complaint, and to the supplemental bill of complaint of the Southern Railway Company in Kentucky, the above-named complainant.

Now come the defendants, A. T. Siler, McDougal Ferguson, C. C. McChord, and L. P. Tarlton, and for plea to the
84 supplemental bill, filed herein at the February, A. D., 1908, rules, and for plea to the original bill herein because of the hereinafter named events which have transpired since the filing of the answer herein, and say:

That in the latter part of November, A. D., 1907, the defendant, C. C. McChord, resigned his office as Railroad Commissioner of Kentucky, which resignation was duly accepted; and that he then and thereupon and has ever since ceased to hold said office or to exercise any of the duties thereof.

That on December 10th, A. D. 1907, the terms of office of the defendants, A. T. Siler and McDougal Ferguson, by the Constitutional and statutory laws under which their said offices were created and the terms thereof fixed, expired; and that their commissions of office and all their rights, privileges and duties, which they held and exercised under said commissions and as such officials and railroad commissioners holding under the elections set up in the original bills herein, then ceased and determined; that the terms of office which the last named two defendants now hold under, and the commissions which they now hold as railroad commissioners, and under which they now exercise the functions of said office, are terms of office beginning on December 10th, A. D. 1907, and commissions for said terms awarded them by reason of the fact that at the regular Kentucky State election, held in November, A. D., 1907, they were duly elected railroad commissioners, the said Ferguson for the first district of Kentucky, and the said Siler for the third district of Kentucky, for the term of four years from and after December 10th, A. D., 1908; that they thereupon took the oath of
85 their office, entered upon the discharge of the duties thereof, and are now holding and exercising same by virtue of, and solely by virtue of and under the said election of November 1907, and their commissions thereupon awarded them.

That the Railroad Commission of Kentucky, as composed and constituted at the time of the institution of this action, has, by virtue of said resignation of said McChord, and the said expiration of the terms of office of said Siler and said Ferguson, ceased to exist; that this action was and is an action to control, restrain, direct and order, by the compulsory processes of this

Honorable Court, the actions of said members of said commission, and that the relief sought by the complainant herein is against and by reason and virtue of an act or acts of the said Siler, McChord and Ferguson as Railroad Commissioners of Kentucky, done by them on or about July 19th, A. D. 1906, and long before the said resignation of the said McChord, and the said expiration of the terms of office and official commissions of the said Siler and the said Ferguson as such railroad commissioners; that the duties, acts, laws, regulations, and facts, out of which this litigation arises, are official duties, acts, laws, regulations, and facts, and are and were incident to and resultant from, and solely incident to and resultant from acts done by, and the fact that the said three defendants constituted and were, the railroad commissioners of Kentucky on said July 19th, A. D. 1906, under terms of office and commissions which have since terminated by resignation and by law, as aforesaid.

That the defendant, L. P. Tarlton, was, by a majority of the duly qualified and voting electors, who voted at the regular 1907 election in and for the State of Kentucky, and the second Railroad
86 Commission District thereof, at said election duly chosen as Railroad Commissioner of Kentucky for said second district; that he thereupon took the oath of his said office, entered upon the discharge of the duties thereof, and is still so acting; that said office is the same office which was held by the defendant C. C. McChord at the time of the institution of this action, and up and until his aforesaid resignation; that the said Tarlton had and took no part in the acts complained of in the original bill herein nor has he ever threatened or endeavored to issue any of the rate orders, or to set on foot any of the prosecutions, or to do any of the things, or to participate in the doing thereof, complained of and sought to be enjoined herein; that neither the said Siler, nor the said Ferguson, nor the said McChord, nor the said Tarlton has ever consented, nor does either or any of them now consent that the said Tarlton may be substituted as, or made a party defendant herein.

That by virtue and by reason of the foregoing set out facts, this action has abated, and now stands abated as to each and all of the defendants herein named, and that same cannot be maintained longer against them or either or any of them.

All of which matters and things these defendants aver to be true, and they plead the said abatement to the bill and supplemental bill, and to each of them, upon which abatement and the said facts, matters and things in support thereof, they pray the judgment of this Honorable Court, and as to whether this cause may further proceed; and they pray to be dismissed hence with their costs.

BENNETT H. YOUNG,
THOS. H. PAYNTER,
CHAS. C. McCHORD,
87 ROBT. H. WINN,
Counsel for Defendants.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

ROBT. H. WINN,
Of Counsel for Defendants.

STATE OF KENTUCKY,
County of Franklin:

A. T. Siler, being duly sworn, deposes and says that he is one of the above-named defendants; that the foregoing plea is true in point of fact, and is not interposed for delay.

A. T. SILER.

Subscribed and sworn to before me this 11″ day of February, A. D., 1908. My notarial commission will expire 24″ Jany. 1910. Given under my hand and seal of office.

[SEAL.] CHAS. G. MUTZENBERG,
Notary Public, Franklin County, Kentucky.

The foregoing plea is endorsed in words and figures as follows, viz: Filed at Rules, Mar. 2, 1908, W. G. Chapman, Clerk.

88 On a day following, to-wit, on the 9th day of March, A. D., 1908, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY COMPANY IN KENTUCKY
vs.
CHARLES C. MCCHORD ET AL.

This day came, and now comes the complainant, the Southern Railway Company in Kentucky and sets down for argument the plea in abatement of the defendants, filed herein as of February 1908 Rule Day.

The Complainant, upon notice to defendants, having set down the plea of defendants, filed at March Rules 1908, for argument, and said plea coming on for argument and having been argued by counsel for complainant and defendants, the same was overruled by the court, to which ruling the defendants excepted and they have ten days in which to answer.

On a day following, to-wit, on the 18th day of March, A. D., 1908, defendants filed their answer to the supplemental bill, which said answer is in words and figures as follows, viz:

89 In the Circuit Court of the United States for the Eastern District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

Answer to Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The defendants, Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, individually and as constituting the Railroad Commission

of the State of Kentucky, respectively, now and at all times saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the errors, uncertainties and imperfections in complainant's supplemental bill contained, for answer thereto, or so much thereof as they are advised it is material or necessary for them to make answer to, jointly and severally answering, say:

Defendants admit the resignation of Charles C. McChord, the appointment of W. P. Walton, the election of defendants Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, and that each of them was duly qualified and that said defendant Siler was selected as Chairman of the Commission, all in the manner and on the dates set forth in said supplemental bill.

Further answering, defendants adopt, reiterate and affirm each and all of the statements and allegations set forth in the original answer herein as particularly as if the same were again here repeated, reiterated and set forth in full.

Defendants deny that they or any of them, either individually or as constituting said commission, have threatened to enforce the Railroad Commission's orders or any of them complained of
90 herein.

Wherefore, defendants pray as in their original answer and that they have such further and other relief in the premises as to this Honorable Court may seem mete and in accordance with equity.

R. H. WINN,
T. H. PAYNTER,
BENNETT H. YOUNG &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing answer is endorsed in words and figures as follows, viz: Filed Mar- 18, 1908, Chas. N. Wiard, Clerk.

On a day following, to wit, on the 23rd day of May, A. D., 1908, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Order.

By consent the replication of the above named complainant to the answer of the above named defendants is now filed *nunc pro tunc* as of the date when it was due.

The Replication, referred to in the foregoing order, is in words and figures as follows, viz:

91 Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Replication.

The Replication of the Above Named Complainant to the Answer of the Above Named Defendants.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

HUMPHREY & HUMPHREY,
Attorneys for Complainant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed May 23rd, 1908, Chas. N. Wiard, Clerk.

92 On the 10″ day of July, A. D., 1908, pursuant to an order of court, Complainant filed its Amended Bill in said cause, which Amended Bill is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Amended Bill.

The Complainant, Southern Railway Company in Kentucky, by leave of court, now amends paragraph 12 of its original bill herein by adding thereto the following additional allegations to-wit:

The complainant further states that said Commission, as its order promulgated July 20, 1906, and herein complained of shows on its face, made and applied its said schedule of maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 1," to the complainant and to only three other of the railroad companies operating lines in Kentucky; viz., the Louisville & Nashville Railroad Company, the Cincinnati, New Orleans & Texas Pacific Rail-

way Company and the Nashville, Chattanooga & St. Louis Railway; and made and applied its said schedule of maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 2," to the Illinois Central Railroad Company alone.

Complainant states that said Commission by its said order did not make or apply, nor has it by any other order before or since, made or applied either of its said Standard Tariffs Nos. 1 and 2, or
93 any other schedule of maximum freight rates to the following railroad companies, which were then, have ever since been and are now within the jurisdiction of the State of Kentucky, and were then, have been ever since and are now engaged in the same business in said State as the complainant; that is to say, as common carriers of intra-state freight and passengers, with the following owned and operated mileage of railroad in said state, to-wit: the Chesapeake & Ohio Railway Company, 424.87 miles; the Louisville, Henderson & St. Louis Company, 165.20 miles; the Louisville & Atlantic Railroad Company, 101.10 miles; the Lexington & Eastern Railway Company, 92.54 miles; Mobile & Ohio Railroad Company, 39.69 miles; and all other railroad companies, of which there were many, owning and operating then, ever since and now, a railway in said state, with shorter mileage—all of which companies were made defendants to the complaints in the proceeding before said Commission, which culminated in the making of said order promulgated July 20, 1906.

The complainant states that while said Commission stated in its said order it made no mileage scale of rates or classification for the use of the Chesapeake & Ohio Railway Company, it is true said Commission ordered that said Company should not collect and receive for the transportation of commodities rates in excess of those permitted to be charged by this complainant, as shown in said Commission's said Standard Tariff No. 1, but said Commission then and ever since has refrained from mailing to any officer, agent or employé of the Chesapeake & Ohio Railway Company a copy of its said order, or from putting or attempting to put the said order as to that company into force and effect, as prescribed in the McChord Act, or otherwise, and said order as to the Chesapeake & Ohio Railway Company has never been completed or made effective by said Commission, nor has it been observed by that company.

94 The complainant states that said Commission by its said order arbitrarily and without authority of law undertook to classify complainant with said three other companies and to prescribe a schedule of maximum freight rates for observance and to be observed by complainant, while neither it nor the Legislature of said state has ever prescribed any schedule whatever of maximum freight rates for or to be observed by said other above mentioned railroad companies, or either of them, then and now owning and operating their lines of railroad in said state, although they were then, have been ever since and are now engaged in the same business in which complainant was then and now engaged, to-wit: the carrying of intra-state freight on their lines within the State of Kentucky; and said Commission thus permitted said other railroad companies to operate their said lines of railroad and conduct their

said business in said state, without any schedule of maximum rates having been prescribed for them, and to charge, collect and receive higher rates than those prescribed as the maximum rates for complainant on the same classes of intra-state freight and commodities, for the same distances, or such freight rates as such other railroad companies might or may deem reasonable, over their lines in Kentucky.

Complainant states that said arbitrary and unlawful classification of said railroad companies and prescribing of maximum intra-state freight rates for complainant and the few other railroad companies above named, and not for all railroad companies doing the same kind of business in Kentucky, was and is a positive, direct and unfair discrimination against complainant in favor of such other companies, and amounts to a denial by the State of Kentucky and said Commission (which is one of the instrumentalities provided
95 by said State, under its Constitution and laws clothed with the powers of said state, and acting for and in its behalf) to complainant of the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

And the Complainant further amends the 10th paragraph of its bill and files herewith as part hereof a table showing the maximum rates, Kentucky Railroad Commission's Standard Tariff No. 1, and the schedule of freight rates of complainant at that time existing, and which was to be displaced by said maximum rates, Kentucky Railroad Commission's Standard Tariff No. 1. Complainant also files herewith a table showing its commodity tariff, and which was displaced by said Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1. And complainant states that many of its rates existing at the time the order of the Commission was made were the same as the rates prescribed by the Commission; and many of them were lower than such rates; and complainant says that the said Commission had no power to make any order in reference to any of its rates which were the same as those fixed in the Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, nor any that were lower than such standard tariff.

The complainant amends Paragraph 13 of its bill of complaint and states that the statute of the State of Kentucky under which the Commission acted and which is therein referred to and described is violative of the Fourteenth Amendment of the Constitution of the United States, particularly Section 1 thereof; and complainant pleads and relies upon such amendment and asks the advantage thereof.

Wherefore complainant prays as in its original bill and for all other relief to which it in equity may appear to be entitled.

96 SOUTHERN RAILWAY COMPANY
IN KENTUCKY,
By ALEX. P. HUMPHREY,
General Counsel.

Exhibit "Table showing Commodity Tariff," filed with the foregoing amended bill, is in words and figures as follows, viz:

Comparison of Present Southern Railway in Kentucky Rates with Rates Prescribed in Railroad Commission's Order of June 20, 1906.

A=Present Rates. B=Commission's Scale. C=Reduction in Present Rates.

		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
10 miles and less.....	A	10	9	8	7	6	5	5	6	5	5	6	7	10	5	5	4	3
	B	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
	C	..	1	1	1	..	..	..	1	1	1	1	2	2	..	1	1	1
Over 10 and not over –5.....	A	15	13	12	10	9	8	8	9	6	6	9	9	12	8	6	4	4
	B	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
	C	3	3	2	1	1	1	1	2	1	1	2	2	2	1	1	..	1
Over 15 and not over 20.....	A	18	16	14	12	11	9	9	11	7	7	11	11	14	9	7	5	5
	B	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
	C	2	2	2	2	1	..	..	2	1	1	2	2	2	..	1	..	1
Over 20 and not over 25.....	A	20	17	15	13	12	10	10	11	7	7	11	11	14	9	7	5	5
	B	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
	C	3	2	2	2	1	..	..	1	..	1	1	1	..	..	..	..	1
Over 25 and not over 30.....	A	23	20	17	15	14	13	13	13	9	9	13	13	18	13	9	5	5
	B	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
	C	3	3	2	2	2	2	2	2	1	3	2	2	2	2	1	..	..
Over 30 and not over 35.....	A	23	20	17	15	14	13	13	13	9	9	13	13	18	13	9	5	5
	B	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
	C	1	1	..	1	..	..	..	..	1	2	..	..	2	..	1	..	..
Over 35 and not over 40.....	A	23	20	17	15	14	13	13	13	9	9	13	13	18	13	9	5	5
	B	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
	C	..	..	..	..	..	..	..	..	..	2	..	..	..	..	..	..	..

Over 40 and not over 45.....	A	26	23	20	17	16	15	15	15	12	10	15	15	20	15	12	7	6
	B	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
	C	..	..	..	..	..	..	..	..	2	2	..	..	..	..	2	1	1
97 Over 45 and not over 50	A	26	23	20	17	16	15	15	15	12	10	15	15	20	15	12	7	6
	B	28	24	21	18	18	17	17	17	11	8	17	17	22	17	11	7	5
	C	..	..	..	..	..	..	..	..	1	2	..	..	..	..	1	..	1
Over 50 and not over 55.....	A	28	25	22	20	18	15	15	16	13	10	15	15	20	15	12	8	7
	B	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
	C	..	..	..	..	..	..	..	..	2	2	..	..	..	..	1	..	2
Over 55 and not over 60.....	A	28	25	22	20	18	15	15	16	13	10	15	15	20	15	12	8	7
	B	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
	C	..	..	..	..	..	..	..	..	1	2	..	..	..	..	..	..	1
Over 60 and not over 65.....	A	31	28	25	22	20	17	17	18	15	11	17	17	24	16	14	10	9
	B	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
	C	..	..	..	..	..	..	..	..	2	2	..	..	..	..	1	1	3
Over 65 and not over 70.....	A	31	28	25	22	20	17	17	18	15	11	17	17	24	16	14	10	9
	B	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
	C	..	..	..	..	..	..	..	..	2	2	..	..	..	..	1	..	3
Over 70 and not over 75.....	A	34	30	26	23	21	19	19	21	16	12	19	20	28	19	15	11	10
	B	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
	C	..	..	..	..	..	..	..	1	2	2	..	..	..	..	1	1	3
Over 75 and not over 80.....	A	34	30	26	23	21	19	19	21	16	12	19	20	28	19	15	11	10
	B	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
	C	..	..	..	..	..	..	..	..	2	1	..	..	..	..	1	..	3

Jobbing Rates Between Louisville and Southern Railway in Kentucky Stations, in Blocks of Five Miles, as Compared with Commission's Order of June 20th, with Same Distances.

A=Present Rates. B=New Rates. C=Reductions. D=Lower than Commission's.

		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
10 miles and less.....	A	10	9	8	7	6	5	5	6	5	5	6	6	10	5	5	4	2
	B	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
	C	..	1	1	1	..	..	..	1	1	1	1	1	2	..	1	1	..
	D	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Over 10 miles and not over 15.	A	10	9	8	7	6	5	5	5	5	6	6	6	10	5	5	4	2
	B	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..
	D	2	1	2	2	1	2	2	2	..	..	1	1	..	2	..	..	1
Over 15 and not over 20.....	A	15	13	12	10	9	8	8	9	6	6	9	9	12	8	6	4	4
	B	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	1	1	..	..	1	1	1	..	..	..	..	..	..	1	..	1	..
98 Over 20 and not over 25	A	18	16	14	12	11	9	9	11	7	7	11	11	14	9	7	5	5
	B	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
	C	1	1	1	1	..	..	..	1	..	1	1	1	..	..	..	..	1
	D	..	..	..	..	..	1	1	..	..	..	..	..	..	1	..	..	..
Over 25 and not over 30.....	A	20	17	15	13	12	10	10	11	7	7	11	11	14	9	7	5	5
	B	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	6	5
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..
	D	..	..	..	..	..	1	1	..	1	..	..	..	2	2	1	..	..

Over 30 and not over 35.....	A	20	17	15	13	12	11	11	11	7	7	11	11	14	10	7	5	5
	B	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	5	5
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	2	2	2	1	2	2	2	2	1	..	2	2	2	3	1	1	..
Over 35 and not over 40.....	A	23	20	17	15	14	13	13	13	9	8	13	13	18	10	9	5	5
	B	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..
	D	1	..	1	1	1	1	1	1	..	..	1	1	..	4	..	1	..
Over 40 and not *and not* over 45	A	23	20	17	15	14	13	13	13	9	8	13	13	18	10	9	5	5
	B	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	3	3	3	2	3	3	3	3	1	..	3	3	2	6	1	1	..
Over 45 and not over 50.....	A	23	20	17	15	14	13	13	13	9	8	13	13	18	10	9	5	5
	B	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	5	4	4	4	4	4	4	4	2	..	4	4	4	7	2	2	..
Over 50 and not over 55.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	10	12	8	7
	B	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
	C	..	..	..	..	..	..	..	..	1	2	..	..	..	..	1	..	..
	D	1	1	1	..	1	2	2	1	..	..	2	2	2	7	..	..	..
Over 55 and not over 60.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	10	12	8	7
	B	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
	C	..	..	..	..	..	..	..	..	..	2	..	..	..	..	..	..	1
	D	3	1	1	1	2	3	3	2	..	..	3	3	4	8	..	1	..

Jobbing Rates Between Louisville and Southern Railway in Kentucky Stations, Etc.—Continued.

A=Present Rates. B=New Rates. C=Reductions. D=Lower than Commission's.

		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
Over 60 and not over 65.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	10	12	8	7
	B	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	1
	D	4	3	3	3	2	4	4	3	1	..	4	4	6	9	1	1	..
Over 65 and not over 70.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	1
	D	6	4	4	3	3	5	5	4	1	..	5	5	6	4	1	2	..
Over 70 and not over 75.....	A	28	27	24	19	17	15	15	15	12	11	16	17	20	10	14	8	7
	B	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..
	D	7	4	3	5	5	5	5	5	2	..	4	..	8	9	..	8	..
Over 75 and not over 80.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	37	32	28	25	25	23	21	21	14	11	21	21	28	19	14	11	7
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	9	7	6	5	7	8	6	5	2	1	6	6	8	4	2	3	..
Over 80 and not over 85.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
99	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	10	8	7	6	5	7	7	6	2	1	7	7	8	4	2	3	..
Over 85 and not over 90.....	A	32	27	24	21	20	19	19	19	12	10	19	19	24	19	12	8	7
	B	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	8	7	6	5	4	4	4	4	2	1	4	4	4	..	2	3	1

Jobbing Rates Between Lexington and Southern Railway in Kentucky Stations, in Blocks of Five Miles, as Compared with Commission's Order of June 20th, with Same Distances.

A=Present Rates. B=New Rates. C=Reductions. D=Lower than Commission's.

		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
10 miles and less.....	A	10	9	8	7	6	5	5	6	5	5	6	6	10	5	5	3	3
	B	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
	C	..	1	1	1	..	..	..	1	1	1	1	1	2	..	1	..	1
Over 10 and not over 15.....	A	10	9	8	7	6	6	6	6	5	5	6	7	10	6	6	5	4
	B	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	1	1
	D	2	1	2	2	2	1	1	1	..	..	1	..	..	1	..	..	..
Over 15 and not over 20.....	A	15	13	12	10	9	8	8	9	6	6	9	9	12	8	6	5	4
	B	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	1	1	..	..	1	1	1	..	..	..	..	..	..	1	..	..	..
Over 20 and not over 25.....	A	20	17	15	13	12	10	10	11	7	7	11	11	14	9	7	5	5
	B	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
	C	3	2	2	2	1	..	..	1	..	1	1	1	..	..	..	..	1
	D	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..	..	..
Over 25 and not over 30.....	A	20	17	15	13	12	10	10	11	7	7	11	11	14	9	7	5	5
	B	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	..
	D	..	..	..	..	..	1	1	..	1	..	..	..	2	2	1	..	..

Jobbing Rates Between Lexington and Southern Railway in Kentucky Stations, Etc.—Continued.

A=Present Rates. B=New Rates. C=Reductions. D=Lower than Commission's.

		1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
Over 30 and not over 35.....	A	23	20	17	15	14	13	13	13	9	9	13	13	18	13	9	5	5
	B	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	5	5
	C	1	1	..	1	..	..	..	..	1	2	..	..	2	..	1	..	..
	D	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..
Over 35 and not over 40.....	A	23	20	17	15	14	13	13	13	9	9	13	13	18	13	9	5	5
	B	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
	C	..	..	..	..	..	..	..	..	..	2	..	..	..	..	..	..	..
	D	1	..	1	1	1	1	1	1	..	..	1	1	..	1	..	1	..
100 Over 40 and not over 45	A	26	23	20	17	16	15	15	15	12	10	15	15	20	15	12	7	6
	B	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
	C	..	..	..	..	..	..	..	..	2	2	..	..	..	..	2	1	1
	D	..	..	..	..	1	1	1	1	..	..	1	1	..	1	..	..	..
Over 45 and not over 50.....	A	28	25	22	19	17	15	15	15	12	10	15	15	20	15	12	8	7
	B	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
	C	..	1	1	..	..	..	..	..	1	2	..	..	..	..	1	1	2
	D	..	..	..	..	1	2	2	2	..	..	2	2	2	2	..	..	..
Over 50 and not over 55.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
	C	..	..	..	..	..	..	..	..	1	2	..	..	..	..	1	..	2
	D	1	1	1	..	1	2	2	1	..	..	2	2	2	..	..	..	..

Over 55 and not over 60.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	13	12	8	7
	B	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
=D.....	D	3	1	1	1	2	3	3	2	..	..	3	3	4	3	..	1	..
=C.....	C	..	..	..	..	..	..	..	..	..	2	..	..	..	..	..	..	1
Over 60 and not over 65.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	1
	D	4	3	3	3	2	4	4	3	1	..	4	4	6	4	1	1	..
Over 65 and not over 70.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..	..	1
	D	6	4	4	3	3	5	5	4	1	..	5	5	6	4	1	2	..
Over 70 and not over 75.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	7	6	5	4	4	5	5	4	2	..	5	5	8	4	2	2	..
Over 75 and not over 80.....	A	28	25	22	20	18	15	15	16	12	10	15	15	20	15	12	8	7
	B	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	9	7	6	5	5	6	6	5	2	1	6	6	8	4	2	3	..

Rates Prescribed in Order of Kentucky Railroad Commission, June 20, 1906.

	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
10 miles and under.....	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
Over 10 and not over 15.....	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
" 15 " " " 20.....	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
" 20 " " " 25.....	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
" 25 " " " 30.....	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
" 30 " " " 35.....	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
" 35 " " " 40.....	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
Over 40 and not over 45.....	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
" 45 " " " 50.....	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
" 50 " " " 55.....	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
" 55 " " " 60.....	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
" 60 " " " 65.....	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
" 65 " " " 70.....	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
" 70 " " " 75.....	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
" 75 " " " 80.....	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
" 80 " " " 85.....	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
" 85 " " " 90.....	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
" 90 " " " 95.....	41	35	31	27	24	23	23	23	14	11	23	23	29	19	14	11	8
" 95 " " " 100.....	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
" 100 " " " 110.....	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
" 110 " " " 120.....	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8
" 120 " " " 130.....	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
" 130 " " " 140.....	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
" 140 " " " 150.....	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10

| | | |

The foregoing amended bill, with exhibits attached, are endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10" day of July, A. D., 1908, defendants filed their answer to complainant's amended bill, which answer is in words and figures as follows, viz:

102 In the Circuit Court of the United States for the Eastern District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Answer.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The defendants, Adam T. Siler, McD. Ferguson and L. P. Tarlton, for answer to so much of complainant's amended bill as they are advised it is necessary for them to answer, say:

They admit that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 1," was made applicable to the complainant, the Louisville & Nashville Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky, and the Nashville, Chattanooga & St. Louis Railway Company, and that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 2," was made applicable to the Illinois Central Railroad Company. Defendants admit that neither of said tariffs was made applicable to the other railroads named by complainant except said Standard Tariff Number 1 was made applicable to the Chesapeake & Ohio Railway Company, and that no notice of said tariff has ever been served upon said latter Company.

Defendants deny that said Commission either arbitrarily or without authority of law undertook to classify complainant with three other companies or without such authority to prescribe a Schedule of Maximum Freight rates for its observance. Defendants
103 admit that the Legislature has never prescribed any Schedule of Maximum Freight Rates for complainant or the other railroads named, nor has this Commission prescribed any such maximum schedule other than as shown by its order of July 20, 1906. Defendants admit that said other railroads are engaged in the carrying of intra-state freight on their lines within the State of Kentucky. They deny that either of said railroads is permitted to or that they do receive higher rates than those prescribed as the maximum rates for complainant on the same classes of intra-state freight

or commodities for the same or any distances or that such companies are permitted to charge such freight rates as they might or may deem reasonable over their several lines in Kentucky. Defendants say that the circumstances and conditions as regards the business of conducting transportation in the State of Kentucky by said other railroads are entirely dissimilar to that of complainants and there is no similarity with respect to the original cost of construction, the present valuation, the capitalization, the volume of business, the earnings or operating expenses, the financial condition or general conditions with respect to conducting transportation by either of said companies to that of complainant and for this reason defendants did not make said schedule of Maximum Freight Rates applicable to either of said other railroads, and for the further reason that the rates upon said other railroads except in a very few minor instances were not higher than the Schedule of Maximum Freight Rates so made by these defendants. Defendants deny that they have made any unlawful classification of said railroad companies or that they have prescribed or that they made any arbitrary or unlawful maximum intra-state freight rates for complain-
104 ant or either of said railroad companies doing the same kind of business in Kentucky. They deny that their said order was or is a positive or other direct, unfair, or other discrimination against complainant in favor of such other companies, and they deny that the same amounts to a denial by the State of Kentucky and said Railroad Commission to complainant of the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, or any other section, or any other provision or Section of said Constitution.

As regards the table filed with complainant's amended bill purporting to show the schedule of complainant's freight rates existing at the time said Standard Tariff No. 1, and the order of said Commission was made, and as regards the table also filed by complainant purporting to show its commodity rates as compared with said Standard Tariff, and as to how many of complainant's rates existing at the time the order of the Commission was made were lower than such rates so made by said Commission, defendants, at this time, have not knowledge or information sufficient to enable them to state, and as to the truth of complainant's said allegation defendants demand the strictest proof. Defendants deny that said Commission had no power to make any order in reference to any of complainant's rates which were the same as those fixed in the Maximum Rates, Kentucky Railroad Commission Standard Tariff No. 1, or any that were lower than said Standard Tariff.

Defendants deny that the Statute of the State of Kentucky under which the Commission acted is violative of the Fourteenth Amendment of the Constitution of the United States, particularly section One thereof, or of any other section or amendment of said Constitution.

105 Wherefore having fully answered defendants pray as in

their original answer and for all relief to which they in equity may appear to be entitled.

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG, &
C. C. McCHORD,
Attorneys for Defendants.

The foregoing answer is endorsed in words and figures as follows, Filed July 10, 1908. Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the replication of complainant to answer of defendants, was filed in said cause, which replication is endorsed in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

The Replication of the Above Named Complainant to the Answer of the Above Named Defendants to the Amended Bill.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to
105 the manifold errors, uncertainties and insufficiencies of the answer of said defendants to the amended bill, for replication thereunto states that it does and will ever maintain and prove its said amended bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants to the amended bill is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honaroble Court shall direct, and humbly — as in and by its amended bill it has already prayed.

ALEX. P. HUMPHREY,
General Counsel for Complainant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed July 10th, 1908. Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following stipulation was filed in said cause, as follows, viz:

Circuit Court of the United States, Eastern District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Stipulation.

107 It is hereby stipulated by complainant and defendants as follows:

With the view of saving time and expense incident to taking proof in this case, if it shall turn out that there are grounds upon which the case can be decided without such evidence, complainant is to make a motion to instruct the Special Commissioner to report that the order of July 20, 1906, is void, basing such motion on such grounds as may be assigned in writing, and on the face of the pleadings in this cause, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky pending the inquiry which led to the order of July 20, 1906. Defendants are to object to the said motion and urge any ground of objection that seems to them fit, except as to the manner of raising the questions involved; which is waived; but defendants' counsel are to have reasonable notice of the time and place fixed for the hearing of such motion, unless the same shall be agreed upon between counsel for complainant and defendants. The making of this motion is not to be construed as a waiver of any other ground of relief which complainant has asserted in its bill, and especially is not to be considered as a waiver of the ground asserted in the bill that the rates fixed by the order are unreasonable and confiscatory.

If the said motion is decided in favor of complainant and any decree based thereon is reversed upon appeal, such reversal is not to prejudice the right of the complainant to urge such other grounds of relief as are above stated. Pending said motion and any appeal from any order or decree based thereon, the further taking of proof before the Special Commissioner is to be suspended.

108 Each party is to aid the other in a speedy determination of said motion, and the speedy determination of any appeal which may be taken consequent upon the action of the Circuit Court thereon.

Nothing herein is to be deemed a waiver by the defendants of their right to make any objection they may wish to make to the jurisdiction of the court of this action.

May 2, 1908.

SOUTHERN RAILWAY COMPANY
IN KY.,
Per ALEX. P. HUMPHREY,
R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG, &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following stipulation was filed in said cause, viz:

Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER, &c., Defendants.

Stipulation.

It is hereby stipulated and agreed between the undersigned counsel for complainant and defendants that the following are all
109 the pleadings, demurrers and motions filed before said Commission pending the inquiry which led to the order of July 20, 1906, herein complained of, to-wit:

1. Those made exhibits with the answer of the defendants to the bill of complaint of the Louisville & Nashville Railroad Company in the case of said Company against Adam T. Siler *et al.*, now pending in this court and being a companion case to this case.

2. The special and general demurrers and other motions set forth in the seventh paragraph of the bill of complaint herein. These motions and the special and general demurrers were substantially similar to those filed by the Louisville & Nashville Railroad Company, copies of which are attached to a stipulation similar to this which has been made in said cause.

3. The answers of this complainant in said proceeding, which are in words and figures as follows, to-wit:

"Railroad Commission of Kentucky.

"J. ED. GUENTHER, &c., Plaintiffs,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, &c., Defendants.

Separate Answer of Southern Railway Company to Complaint of Norman Lumber Company, &c.

"Defendant, Southern Railway Company in Kentucky, without waiving but expressly relying upon its motions hereinbefore made, for separate answer to the complaint of the Norman Lumber Company, the Louisville Veneer Mills and the Calloway Lumber Company, denies that said complainants were directly affected by the rates or classifications of freight to or from all points in said state.

"1. Defendant denies that its local freight rates, or any of
110 them, between points in the State of Kentucky, on any commodity, are excessive or extortionate, or that its freight classifications, or any of them, are discriminatory or extortionate.

"2. Defendant denies that any of its rates or classifications on lumber, logs, ties or all or any timber commodities to or from points in Kentucky are extortionate or discriminatory or unreasoanble.

"3. Defendant denies that its rate on railroad or cross ties from or to any points in Kentucky is fixed by it so as to amount to confiscation or to prevent the producer or owner of such railroad or cross-ties from getting them to any open market, or compels him to sell them to defendant at such price as defendant may see fit to offer, or that any practice of defendant in regard to the rate on railroad or cross-ties is extortionate or confiscatory or unconscionable.

"4. Defendant denies that its rate on cherry, walnut or cedar timber, lumber or logs, to or from any points in Kentucky, is fixed by defendant at three cents or any sum per hundred pounds higher than its rate on all or any other classes of timber, logs or lumber between the same points, and further denies that there is no sound or legal reason for charging three cents per hundred pounds more on cherry, walnut and cedar timber, logs and lumber than on other classes of timber, logs and lumber, or that such practice is unjust or discriminatory or extortionate.

"5. Defendant denies that it makes no allowance to complainants for freight on the necessary standards or sidings for the loading of logs on flat cars; defendant denies that it is legally required to make such allowance, and denies that it would be unreasonable or extortionate if the defendant did require said complainants to
111 furnish said standards and sidings and also required complainants to pay freight thereon.

"Wherefore defendant prays to be dismissed.

(Signed) HUMPHREY, HINES & HUMPHREY.

"*Attorneys for Defendant, Southern Railway Company in Kentucky.*"

"Railroad Commission of Kentucky.

"J. Ed. Guenther, &c., Plaintiffs,
vs.
Louisville & Nashville Railroad Company &c., Defendants.

Separate Answer of Southern Railway Company in Kentucky to Amended Complaint.

"The Southern Railway Company in Kentucky, for separate answer to the amended complaint filed herein by J. Ed. Guenther &c., and without waiving but expressly relying upon each and all of its motions hereinbefore made, says:

"1. The defendant denies that all or any of its local freight rates from or to local points in Kentucky, as fixed or charged by it on

all or any classes of freight, are excessive or discriminatory or extortionate.

"2. The defendant denies that the local rates on freight, or any of them, as fixed, maintained or charged by it, are exorbitant or excessive or extortionate, or that any or all of them discriminate in favor of any communities against other communities, or are in open or any violation of law or against public policy or illegal.

"3. Defendant denies that the local rates, or any of them, fixed, maintained or charged by it throughout the State of Ken-
112 tucky or in any part thereof, fail to treat each local community fairly or equitably, and denies that such rates, or any of them, are arbitarily fixed or maintained so as to build up or discriminate against any community. Defendant denies the correctness of the table of rates referred to in said amended complaint and denominated "Comparison of Local Rates," and denies the correctness of the table of "Comparative Rates on Local Mileage—Scale Basis," referred to in said amended complaint, and says that neither of said tables constitutes relevant or reliable evidence as to the legality of defendant's rates.

"Wherefore, defendant prays to be dismissed.

"(Signed) HUMPHREY, HINES & HUMPHREY,
"Attorneys for Defendant Southern Railway Company in Kentucky.

4. It is stipulated and agreed that each and all of the foregoing motions and demurrers of the complainant had in said proceedings were overruled by said Commission before defendant's said answers were filed therein.

In witness whereof the undersigned counsel have hereunto affixed their signatures, this June 18, 1908.

HUMPHREY & HUMPHREY,
Attorneys for Complainant.
R. H. WINN,
B. H. YOUNG,
T. H. PAYNTER &
C. C. McCHORD,
Attorneys for Defendant.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10th, 1908. Charles N. Wiard, Clerk.

113 On the same day, to-wit, on the 10th day of July, A. D. 1908, a motion was filed in said cause by complainant, which motion is in words and figures as follows, viz:

Circuit Court of the United States, Eastern District of Kentucky.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Motion.

This day came the complainant, and without waiving any other grounds for relief herein, or any other right to a final decree enjoining the enforcement of the order of the defendant Commission complained of, moved the Court, on the face of the pleadings, to instruct and direct the Special Commissioner herein to report that the order of the defendant Railroad Commission, purporting to establish "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Southern Railway Company in Kentucky," made June 20, 1905, and promulgated July 20, 1906, herein complained of, is void, upon the following grounds, to-wit:

1. The statute commonly known as the McChord Act, approved March 10, 1900, undertakes to vest in said Commission, an administrative body, legislative, executive and judicial powers, in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, and is, therefore, unconstitutional and void.

2. Neither the said Statute nor any other Statute of the State of Kentucky provides for an appeal to a court from a final order of said Commission, nor for any judicial investigation or judicial review of the question of the reasonableness of any rate fixed by said Commission for services of a carrier thereafter to be rendered
114 before the carrier is required to put the same into force and effect, but makes such order conclusive as to the sufficiency of the rate thus fixed, and the carrier is thus deprived of its property without due process of law, and denied the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The said Act imposes such enormous fines as a result of an unsuccessful effort to test the validity of the same, or of any final order of said Commission fixing a rate for the services of a carrier to be thereafter rendered, as to render said Act, on its face, violative of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting any state from depriving any person of propery without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

4. Said Act is unconstitutional and void because it undertakes to vest in said Commission, a non-judicial body, the judicial power of adjudging a carrier guilty of extortion for charging, collecting or receiving an existing rate, as a jurisdictional fact, to be first ascertained, before fixing a rate which such carrier may charge, collect or receive for like services thereafter rendered, without affording the carrier thus convicted an opportunity to be heard in any court on the question of its guilt or innocense of the offense of extortion, or

on the question of the reasonableness or sufficiency of the rate thus fixed after such conviction for like services thereafter rendered, whereby the carrier is deprived of its property without due process of law, and denied the equal protection of the laws guaranteed by the provisions of Section 1 of the Fourteenth Amendment to
115 the Constitution of the United States.

5. Neither under the title nor the provisions contained in the body of said Act is said Commission authorized or empowered to prescribe and establish schedules of maximum rates or tariffs for the services of railroad carriers as is attempted to be done by the order promulgated July 20, 1906, herein complained of.

6. The allegations of the complaints on which the order complained of herein was made and promulgated by said Commission were insufficient to give jurisdiction to, or authorize the Commission to make said order, or to prescribe and establish the maximum rates or standard tariff for all of complainant's lines, between all stations, for all distances, on all classes of freight in the State of Kentucky even if said Act empowered said Commission to establish and prescribe such maximum rates or tariffs upon complaints of any character or under any circumstances.

7. Said Commission, without assuming to find or condemn any of complainant's rates, except those set forth in its "Table A, Local Freight Tariff," as extortionate—which was a jurisdictional fact or condition precedent, in any event, to its exercise of power (if any it had at all in that respect) to make or fix rates—by its said order undertook to forbid complainant to charge, collect or receive rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances than those shown in said Commission's "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Southern Railway Company in Kentucky, whereby said Commission attempted to prohibit complainant from increasing or advancing any rate or rates it had or has in force and effect on any commodity or commodities belonging to either of the classes set out in said so-called "Standard
116 Tariff No. 1," notwithstanding the fact that such commodity rate or rates had not been found by said Commission to be extortionate, and the further fact that they were and are lower for the same distances than the maximum class rates which said Commission by its said order prescribed and promulgated as reasonable.

8. Said Commission did not assume to find or condemn all of complainant's rates as extortionate but only such as were in excess of the mileage scale of rates fixed for the Louisville & Nashville Railroad Company and designated "Maximum Rates, Kentucky Railroad Commission, Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad Company." And although a large number of the rates of complainant were not in excess of such mileage scale of rates but only equal thereto, the said Commission undertook to forbid this complainant from charging, collecting or receiving for the transportation of commodities rates in excess of said maximum rates of the Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Railroad Com-

pany. And in this respect also this order was beyond the jurisdiction of the Commission and beyond the authority conferred on it by the statute and under which it purported to act.

So that the tariff prescribed for this complainant is void both in respect to the rates which complainant then had in force and which were the same as the rates prescribed in the said Maximum Tariff, and in respect to the rates which complainant then had in force and which were less than the rates prescribed in said Standard Tariff; and being so void in both of said respects, is entirely void, and valid part being not separable from the invalid part.

9. The said order shows on its face that the maximum
117 rates therein prescribed, styled "Kentucky Railroad Commission's Standard Tariff No. 1, were arbitrarily made applicable to the complainant, and were not made applicable for the same distances and on the same classes of freight to all the other railroad companies operating lines in Kentucky, and although without statutory power or authority to classify the said railroad companies in Kentucky on any basis whatever, for the purpose of prescribing freight rates to be charged and collected by them, the said Commission, by said order, undertook to prescribe such maximum freight rates to be observed by the complainant company, while other railroad companies operating lines in Kentucky were and are permitted to charge and collect higher rates on the same classes of freight for the said distances, or such freight rates as such other companies may deem reasonable, although said other companies were made defendants to and proceeded against under the same complaints before said Commission in the proceedings which culminated in the making of said order promulgated July 20, 1906, and thus the attempted classification by said Commission in this respect was not based upon the character or value of the services rendered; and said order, therefore, is unfair and discriminating, and amounts to a denial to complainant of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

June 18th, 1908.

ALEX. P. HUMPHREY,
Attorney for Complainant.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

118 On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants filed a motion in said cause, which said motion is in words and figures as follows, viz:

The United States Circuit Court for the Eastern District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

This day came the defendants and objected to complainant's written motion and grounds thereof, and moved the court, on the face of the pleadings, to enter an order dismissing this action, because

First. This Court has no jurisdiction of the alleged cause of action set out in complainant's bill.

Second. The bill does not show any equity; and the averments of defendants' answer with respect to questions raised by said motion must be taken as admitted.

Third. None of the grounds stated in said motion is sufficient to entitle complainant to the relief sought.

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG, &
C. C. McCHORD.
Attorneys for Defendants.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

119 On the same day, to-wit, on the 10th day of July, A. D., 1908, the opinion of the court was filed in the case of the Louisville & Nashville Railroad Company *vs.* Adam T. Siler *et al.*, which said opinion, by the last paragraph thereof, this being one of the three other cases, is made a part of this cause; same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
vs.
A. T. SILER, McD. FERGUSON, & L. P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

This cause has been submitted on motion for a final decree as prayed in the bill, pursuant to stipulation of the parties.

In the case of Louisville & Nashville R. R. Co. *vs.* McChord, 103 Fed. 216, Judge Evans, after full argument and careful consideration, held what is known as the McChord Act involved herein to be unconstitutional and enjoined the Railroad Commissioners from taking action thereunder. On appeal to the Supreme Court this decree was reversed.

McChord, *et al.*, *v.* L. & N. R. R. Co., 183 U. S. 483.

It was not reversed, however, on the ground that he had erred in holding said act unconstitutional, but on the ground that the action enjoined was legislation and a court had no authority to enjoin anticipated legislation. The question of constitutionality was waived and the only reference to it in the opinion was that it was a
120 matter of "grave importance."

In the recent case of *In re* Young that went up from Minnesota, Mr. Justice Peckham cited Judge Evans' decision as an authority in support of the position there taken.

At the time of Judge Evans' decision this state had not been divided into two judicial districts. The decision was that of the United States Circuit Court for the District of Kentucky. This court has succeeded that court as to the Eastern District of Kentucky. In view of this, I do not think that I should consider the question on its merits. Comity requires that I should follow this holding of Judge Evans, backed up as it is, to a certain extent, by said reference to it by the Supreme Court. I, therefore, in accordance with said decision, hold said act unconstitutional.

In addition I think it is to the interest of the parties to get this case to the Supreme Court as soon as possible where a decision can be had that is final as to the constitutionality of the act.

Until today I had not read the decision of the Supreme Court in the McChord case, all previous steps in this case, since the granting of the temporary restraining order, having been taken by consent of parties hereto; and I was under the impression that in that case the Supreme Court had overruled Judge Evans' holding that said act was unconstitutional. Otherwise, possibly, I might have indicated this position to the parties earlier in this cause.

Question is made as to the jurisdiction of this court of this case on the ground that there is no diversity of citizenship. Under the decision in the case of Raymond *v.* Chicago Traction Co. 207
121 U. S. 20, it would seem that this court has jurisdiction because of the federal question raised in the claim that the action of the Railroad Commissioners was in violation of the 14th amendment. If not, it has it because of the claim that said act itself is a violation thereof.

The motion is sustained and decree will be prepared accordingly.

Similar motions in the three other cases heard at same time are sustained and decrees in those cases will be prepared also.

July 10th, 1908.

A. M. J. COCHRAN, *Judge.*

The foregoing opinion is endorsed in words and figures as follows, viz: Filed July 10th, 1908. Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the final decree was entered in said cause, which decree is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

122 SOUTHERN RAILWAY COMPANY IN KENTUCKY, Complainant,

vs.

ADAM T. SILER ET AL., Defendants.

Final Decree.

This day came the complainant and tendered and offered to file its amended bill, which is ordered to be filed; to which amended bill defendants filed their answer, and to which answer complainant filed its general replication.

Thereupon came the counsel for complainant and counsel for defendants and tendered and offered to file their stipulation, dated May 2, 1908, and their stipulation dated June 18, 1908, which are ordered to be filed.

The counsel for complainant thereupon, in pursuance of said stipulations, entered their motion in complainant's behalf, dated June 18, 1908, and moved the Court on the face of the pleadings, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky, pending the inquiry which led to the order of July 20, 1906, and upon the written grounds set forth in said motion, to instruct the Special Commissioner herein to report that the order of the Railroad Commission of Kentucky, purporting to establish what is styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," Applicable to the Complainant, made June 20, 1906, and promulgated July 20, 1906, herein complained of, is void.

Thereupon counsel for defendants filed their objections to complainant's said motion, and entered their motion in behalf of defendants, on the face of the pleadings and the written grounds set forth in their said motion, that the court enter an order dismissing this action.

123 And said motions having by agreement of counsel been set for hearing on this day, the same were fully argued by counsel for complainant and defendants, and the court being fully advised thereupon ordered, adjudged and decreed as follows:

1. That the said objections and motions of the defendants be and the same are overruled, and the said motion of the complainant be and the same is sustained, the court being of opinion that the act of the General Assembly of the Commonwealth of Kentucky, known as the McChord Act, approved March 10, 1900, and the order of the Railroad Commission of Kentucky, promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory (upon which no decision is or can now be made), violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibit any state from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protec-

tion of the laws, and that said order of said Commission, so far as it is made applicable to complainant, is, therefore, null and void, and the Special Commissioner is directed so to report herein.

2. Thereupon counsel for complainants and defendants stipulated and agreed that the said report of the Commissioner shall be and it now is treated and considered as filed in the terms above prescribed. And thereupon this cause was submitted for a final decree, and the court being further advised, ordered, adjudged and decreed that the preliminary injunction heretofore granted herein be and the same is made perpetual, and the defendants, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, their successors in office,

124 and said Commission, be and they are hereby perpetually enjoined and restrained from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, herein complained of, or putting the same into force or effect, and from enforcing or attempting to enforce the same, so far as it is made applicable to complainant, or so far as it relates to the lines of railroad owned or operated by complainant in the State of Kentucky, and from recommending or procuring indictments against complainant or any of its officers, agents or employés, to recover any fine or penalty for any violation of said order or for charging, collecting or receiving any rate or rates in excess of those prescribed by said order; and said defendants are further enjoined to revoke and cancel said order so far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," applicable to the Southern Railway Company in Kentucky.

3. It is further ordered, adjudged and decreed by the court that the question of costs is not now determined but either party may, after the final determination of this cause in the Supreme Court of the United States, move for an order in regard thereto at the foot of the decree.

4. And then came defendants and in open court prayed and were allowed an appeal from this decree to the Supreme Court of the United States.

Defendants shall execute a bond in the penalty of five hundred dollars without surety conditioned to prosecute said appeal, and file herein their assignment of errors—all within sixty days from the entry of this decree. No citation need be issued, the appeal being granted in open court and complainant being present.

125 The Assignment of Errors, referred to in the foregoing decree, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

SOUTHERN RAILWAY IN KENTUCKY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Assignment of Errors.

The above named defendants, Adam T. Siler, McD. Ferguson, and L. P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, conceiving themselves aggrieved by the judgment entered herein on the 10th day of July, 1908, in the above-entitled cause, pray the court that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the Supreme Court of the United States. Defendants say that in the record and proceedings in said above-entitled cause there is manifest error in this, to-wit:

1. The Circuit Court of the United States for the Eastern District of Kentucky erred in holding and deciding that said court was bound by and should follow the decision of the United States Circuit Court for the District of Kentucky in the case of Louisville & Nashville Railroad Company *vs.* McChord, *et al.*, as reported in 103 Federal 216, and in its interpretation of the opinion in McChord *et al. vs.* Louisville & Nashville Railroad Company reported in 183 U. S. 483, reversing said former decree.

2. That said court erred in holding that it had jurisdiction of these defendants upon the subject matter set forth in the bill of complaint when the allegations of said bill are that these
126 defendants had not been vested with the power by either the Constitution of the State of Kentucky or by any Act of its Legislature or by any law to make and enter the order of July 20, 1906, herein complained of.

3. That said Court erred in rendering judgment against these defendants upon the pleadings in said cause; said judgment is contrary to law and the facts as presented by said pleadings.

4. That said court erred in holding that the Act of the General Assembly of the Commonwealth of Kentucky, approved March 10, 1900, and the order of the Railroad Commission of Kentucky promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory, violate the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which prohibit any State from depriving any person of property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws and in holding that said order of said Commission, as far as it is made applicable to complainant is either null or void and in directing that the Special Commissioner so report.

5. That said Court erred in rendering a perpetual order of injunction against these defendants and their successors in office and

said Commission, enjoining and restraining them from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, and from putting the same into force or effect, and from enforcing or attempting to enforce the same as far as it is made applicable to complainant or as relates to the lines of railroad owned or operated by complainant in the State of Kentucky.

6. That the said court erred in adjudging that these defendants be further enjoined to revoke and cancel said order as far
127 as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1" applicable to complainant and its said lines of railroad in Kentucky.

7. That said Court erred in overruling defendants' objections to complainant's motion and grounds of motion upon which motion and grounds the decree herein was rendered; and in overruling defendants' motion that on the face of the pleadings an order be entered dismissing this action; and said court further erred in sustaining complainant's said motion and grounds of motion, as follows:

(*a*) That said Act of March 10, 1900, undertakes to vest in said Commission Legislative, Executive, and Judicial powers in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky and that said Act is, therefore, unconstitutional, null and void.

(*b*) That because said Act does not provide for an appeal to a court from the final order of said Commission nor for any judicial investigation, or judicial review of the question of the reasonableness of any rate fixed by said Commission for services thereafter to be rendered before it is required to put same into force and effect, such order deprives the carrier of its property without due process of law and denies to it the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

(*c*) That the penalties imposed by said Act are so enormous as to render the Act on its face violative of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from depriving any person of
128 property without due process of law or denying to any person within its jurisdiction the equal protection of the laws; and

(*d*) That said Act is unconstitutional and void because it undertakes to vest in said Commission the judicial power of adjudging a carrier guilty of extortion before fixing a rate which the carrier may charge and without affording an opportunity to be heard in any court and thereby deprives the carrier of its property without due process of law and denies to it the equal protection of the laws guaranteed by the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States; and

(*e*) That said Commission was not authorized or empowered to prescribe and establish schedules of maximum rates; and

(*f*) That the allegations of the complaints on which the order complained of was made were insufficient to give the Commission jurisdiction or to authorize it to make said order; and

(*g*) That said Commission had no power to forbid complainant from charging or receiving rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances than those shown in said Commission's Standard Tariff No. 1; and

(*h*) That said Kentucky Railroad Commission's Standard Tariff No. 1 was arbitrarily made applicable to complainant and was not made applicable for the same distances and on the same classes of freight to all other railroad companies operating lines in Kentucky and on that account that said order is unfair, discriminating and amounts to a denial to complainants of the equal protection of the laws in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

129 Wherefore, said Adam T. Siler, McD. Ferguson and L. P. Tarlton pray that the decree and order of the said Circuit Court of the United States for the Eastern District of Kentucky appealed from herein be reversed.

JAMES BREATHITT,
Att'y Gen'l,
R. H. WINN &
C. C. McCHORD,
Counsel for Defendants.

The foregoing Assignment of Errors is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants executed an appeal bond in said cause, which said bond is in words and figures as follows, viz:

Know all men by these presents, That We, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, as principal-, and —— —— — —— ——, as sureties, are held and firmly bound unto the Southern Railway Company in Kentucky in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Southern Railway Company in Kentucky, its certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of July, in the year of our Lord one thousand nine hundred and eight.

130 Whereas, lately at a Circuit Court for the 10th day of July, in a suit depending in said Court, between The Southern Railway Company in Kentucky, Complainant, and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission of Kentucky, Defendants, a decree was rendered against the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission of Kentucky, and the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission, having obtained an appeal and filed

a copy thereof in the Clerk's Office of the said court to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. T. SILER, *Commissioner.*
McD. FERGUSON, *Commissioner.*
L. P. TARLTON, "

Sealed and delivered in presence of
EMILY H. COLEMAN.
CHAS. N. WIARD.

Approved by
A. M. J. COCHRAN.
U. S. District Judge.

The foregoing bond is endorsed in words and figures as follows, viz: Filed Jul- 10, 1908. Charles N. Wiard, Clerk.

131 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

I, Charles N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing One Hundred and Thirty (130) pages contain a true and complete copy of all the papers filed and proceedings had and entered in the cause, lately pending in the said court wherein the Southern Railway Company in Kentucky was Complainant and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, were defendants, as the same will appear from the records and files of my said office; that I have compared the same with the originals, and it is a true and complete transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand as Clerk of the aforesaid Court, and affixed the seal thereof, at Frankfort, in said District, this the 11th day of August, A. D., 1908, and of the Independence of the United States the 133rd year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court, Eastern District of Kentucky, at Frankfort.

Endorsed on cover: File No. 21,319. E. Kentucky C. C. U. S. Term No. 523. Adam T. Siler, McDougal Ferguson, and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, appellants, *vs.* Southern Railway Company in Kentucky. Filed August 27, 1908. File No. 21,319.

(21,320.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 524.

ADAM T. SILER, McDOUGAL FERGUSON, AND LEW P. TARLTON, CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, APPELLANTS,

vs.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

Record of the Proceedings of the Circuit Court of the United States for the Eastern District of Kentucky, in the Cause and Matter Hereinafter Stated, the Same Being Disposed of at a Regular Term of said Court Begun and Held in the City of Frankfort on the Second Monday in March, A. D. 1908, Being the 9th Day of said Month, and the Final Decree in said Cause Being Entered on the 10th Day of July, A. D. 1908.

Present: The Honorable A. M. J. Cochran, United States District Judge.

In Equity. No. 545.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER, MCDOUGAL FERGUSON, and LEW P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

2 Said Action was commenced on the 25th day of July, A. D. 1906, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

On the 25th day of July, A. D. 1906, Complainant filed its Bill of Complaint in said cause, which said Bill is in words and figures as follows, viz:

3 United States Circuit Court for the Sixth Circuit and Eastern District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, MCDOUGAL FERGUSON and ADAM T. SILER, Commissioners Composing the Railroad Commission of Kentucky, Defendants.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky:

Your complainant, The Cincinnati, New Orleans and Texas Pacific Railway Company brings this bill of complaint against

Charles C. McChord, McDougal Ferguson and Adam T. Siler, who compose what is known as the Railroad Commission of Kentucky, and thereupon your complainant says:

I.

That it is an corporation duly created by and organized under the laws of the State of Ohio and not of the State of Kentucky, with its principal office in the State of Ohio, and is a citizen and resident of said State of Ohio and not of the State of Kentucky; and that the defendants, Charles C. McChord, McDougal Ferguson and Adam T. Siler are and each of them is a citizen and resident of the
4 State of Kentucky and that the amount in controversy in this cause exceeds the sum or value of $5,000.00, exclusive of interest and costs.

II.

Your complainant is now and for some time last past has been the owner as lessee and in control and possession of the following described line of railroad in the State of Kentucky, namely, beginning at low water mark on the Ohio side of the Ohio River at the city of Ludlow in the State of Kentucky, running thence through the counties of Kenton, Boone, Grant, Harrison, Scott, Fayette, Jessamine, Boyle, Mercer, Lincoln, Pulaski and Whitley to the Tennessee State line, same being part of the railroad known as the Cincinnati Southern R. R. extending from the city of Cincinnati, in the State of Ohio, to the City of Chattanooga, in the State of Tennessee.

III.

Your complainant further states that in the Constitution of the State of Kentucky it is provided by Section 209 that a commission is thereby established, to be known as the Railroad Commission and to be composed of three commissioners; and that the powers and duties of the Railroad Commission shall be regulated by law. The legislature of the State of Kentucky has passed certain acts, vesting in the said Railroad Commission certain powers and imposing upon it certain duties, the scope or extent whereof is not now necessary to be particularly stated.

The defendants, Charles C. McChord, McDougal Ferguson and Adam T. Siler, are and have been during all of the times hereinafter stated, the members of said Commission.

It is provided by law that the office of the Commission shall be at the seat of government, which is Frankfort, Kentucky, which is within the Eastern District of the State of Kentucky.

The Legislature of the State of Kentucky passed an act
5 which was approved March 10, 1900, and which is now contained in what is known as Carroll's Kentucky Statutes (Edition of 1903), as Section 820-A.

IV.

By the said Section 820-A, above referred to, it is provided that "when complaint shall be made to the Railroad Commission, accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the corporation or company complained of, not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same, and also the nature of the complaint or matter to be investigated, and shall hear such argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered, than that made and fixed by said Commission as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined, for the first offense, in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction, in any sum not less than two thousand dollars nor more than five thousand dollars."

6

It is further provided that the Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation, and the Circuit Court of the county in which such offence may be committed by said officer, agent or employé shall have jurisdiction in all prosecutions against said officer, agent or employé.

V.

Your complainant further states that in the early part of the year 1905 certain merchants living and doing business in Owensboro, Kentucky, to wit, J. Ed Guenther and others, made a complaint

before the Railroad Commission, complaining of certain rates made by the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and the Louisville, Henderson & St. Louis Railroad Company. No complaint was made in regard to any rate of your complainant, and the said town of Owensboro is not on your complainant's line of railway, nor, at the nearest point, less than 200 miles therefrom nor, to your complainant's knowledge, were any of these merchants shippers over any of your complainant's lines of railway.

On August 26, 1905, the said persons, who had filed the petition above referred to, presented to the Railroad Commission an amended complaint, to which substantially all the railroads in Kentucky were made parties defendant, and among others, your complainant,
7 and which it was alleged as follows:

"The complainants aver and charge that all local freight rates from and to all local points in the State of Kentucky, as fixed and charged by the defendant railroads, on all classes of freight, are excessive, discriminatory and extortionate;"

and in which it was also alleged:

"The complainants aver that the local rates of freight as fixed, maintained and charged by the defendants herein, are exorbitant, excessive and extortionate. They say that some of the rates are excessive; that many of them are extortionate, and all of them discriminate in favor of some local communities as against other local communities, and that the rates charged and maintained by defendant companies are in open violation of law, against public policy, illegal and extortionate;"

and in which it was further alleged:

"Complainants further state that the local rates fixed, maintained and charged by defendant railroads throughout the State of Kentucky, are not uniform; that they do not treat each local community with fairness or equitably, but the rates are arbitrarily fixed and maintained so as to build up a community or discriminate against it at the pleasure of defendant companies."

The prayer of said complainant is as follows:

"Wherefore your complainants pray this honorable Commission not only to revise the local freight rates in and out of the city of Owensboro, but to revise and adjust the rates between all local points, from and to every local point throughout the entire State of Kentucky, and on final hearing they pray for all relief to which they are entitled, both at law and in equity."

8 Your complainant states that nowhere in said amended petition was there pointed out any rate of your complainant which was alleged to be either extortionate or unjust or unreasonable; that the only charge made against your complainant's rates was as contained in the extracts given above from said amended complaint, and these, as will be seen, were of the most general, sweeping and indefinite character.

VI.

Your complainant further states that subsequently, to wit, on September 14, 1905, the Norman Lumber Company and several others united in a petition to be made parties to the proceeding instituted as above. In this petition it was alleged that the petitioners were residents of the State of Kentucky and engaged in shipping lumber, logs, ties and all timber commodities from point to point in the State of Kentucky, over the railroads owned, controlled and operated by the defendants in the State of Kentucky. The said petition contained also the following:

"Petitioners aver and charge that all local freight rates from and to all points in the State of Kentucky, on all commodities, as fixed and charged by the defendant railways, are excessive and extortionate, and that the freight classifications are discriminatory and extortionate. Petitioners aver and charge that the rates and classifications on lumber, logs, ties and all timber commodities to and from all points in Kentucky are especially extortionate, discriminatory and unreasonable."

The said petition further stated that the rate on railroad or cross ties from non-competitive points to all other points in the State of Kentucky is so fixed by the defendants that it amounts to confiscation and prevents the producer or owner of said railroad or cross ties from getting them to any open market.

9 The petition further averred that the rate on cherry, walnut and cedar timber, lumber and logs to and from all points in Kentucky was fixed by defendants at three cents per hundred pounds higher than the rate on all other classes of timber, logs and lumber, and that there was no sound or legal reason for said increased charge on cherry, walnut and cedar timber.

The said petition made a further complaint in regard to petitioners being required to furnish certain standards and sidings for the loading of logs on flat cars.

The petition prayed that the petitioners be made parties complainant, and that the allegations made in the complaint be tried at the hearing herein; that the rates in Kentucky on lumber, logs, ties and all timber products be revised and adjusted, and that all rates on all commodities in Kentucky be reviewed and revised.

On October 14, 1905, the Commonwealth of Kentucky undertook to file an intervening petition, in which, without complaining of any special rates, it made the same general complaint as to all rates to and from every local station and upon every railroad in Kentucky as is stated above in reference to the complaints of the original complainants and of the Louisville Veneer Mills and others, who came in by petition to be made parties, as above alleged.

VII.

Before answering the complaints, amended complaints and intervening petition in the proceeding aforesaid, this complainant, before the defendants constituting said Commission, took the following steps, to wit:

Filed special and general demurrers to the amended complaint

of Guenther, Louisville Veneer Mills and the Commonwealth of Kentucky;

Moved to require an election as to which one of the several defendant railroad companies would be proceeded against;

Moved that the said complaints and amended complaints be made more definite and certain;

10 Moved that a bill of particulars be filed;

Moved that the said amended complaint of the said Guenther and others, and the intervening petition of the Louisville Veneer Mills and the Commonwealth of Kentucky be stricken from the files.

And in every way insisted that a proceeding of such general character could not be maintained, and that the Commission could not make such general proceedings a basis of investigation of rates charged by this complainant;

But each and all of the said demurrers and motions were overruled, ignored and disregarded by the said defendants herein, the Railroad Commission, as were like demurrers and motions made at the same time by the other carriers made defendants to said proceeding.

Thereupon said Commission ruled that the entire subject of railroad rates was before it.

This complainant, then, without waiving any of its said demurrers or motions, filed its answer, traversing every affirmative allegation and material averment of said complaints, amended complaints and intervening petitions.

The complaint of the said lumber companies was first taken up and a decision rendered thereon December 7, 1905, by said Commission, so far as the same pertains specifically to the rates on logs, lumber and cross ties, and to stakes or standards on flat cars loaded with logs or lumber. The Commission ordered, in substance, that all the railroad carriers made defendants to said proceeding should

(1) Make their rates on walnut, cherry and cedar lumber no higher than the rates then shown on their published tariffs on oak, poplar and other grades of lumber, and their rates on walnut, cherry and cedar logs no higher than the rates then shown on their published tariffs on oak, poplar and other grades of logs, and that said log rate should be no higher than seventy per cent. of their lumber rate so fixed;

2. Make their rates on cross ties no higher than their rates on lumber thus fixed, and

11 (3) Make no charge for the transportation of stakes or standards used in equipping their flat cars for the transportation of logs and lumber.

This complainant's rates and regulations were substantially as fixed by defendants, and in such small particulars as they were different this complainant has complied with said order.

VIII.

Your complainant further states that notwithstanding this order really completed all that was properly before the said defendants, even if this was properly before them, the defendants assumed and continued an inquiry under the altogether vague and general and insufficient allegation above mentioned. No proof was introduced by any of the complaining parties before the said defendants, or by any one, that any rate or rates of this complainant were unjust, extortionate or unreasonably high. No evidence was introduced before the said defendants showing the condition or circumstances surrounding traffic handled by this complainant, the expense of conducting various classes of traffic, the character of such traffic, or any other fact from which said defendants could form any judgment that the rates — by this complainant, or any of them, were unjust, unreasonable or extortionate; on the contrary, it was stated by counsel for the complainants in said hearings, including the special counsel of the Commonwealth of Kentucky, that not a shipper had been heard to complain against the rates charged by your complainant, and the Commonwealth asked no relief against it. Nevertheless, the said defendants did, on July 19, 1906, enter an order which, so far as it relates to this complaint, is as follows:

"The Commission is further of the opinion that all rates now in effect upon the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway in Kentucky, as shown by their respective tariffs and mileage scale of rates on file in this office,
12 respectively, to-wit: Cincinnati, New Orleans & Texas Pacific Railway Company's Local Mileage Tariff Number 8, effective January 1, 1906, and Southern Railway in Kentucky's Local Tariff Number 4, effective February 27, 1905, where the same are in excess of the mileage scale of rates hereinbefore fixed for the defendant, the Louisville & Nashville Railroad Company, and herein designated 'Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1. Applicable to the Louisville & Nashville Railroad Company,' are hereby declared to be extortionate, unjust and unreasonable. It is therefore ordered that said Cincinnati, New Orleans & Texas Pacific Railway Company and said Southern Railway Company in Kentucky be, and they are, hereby forbidden to charge, collect or receive for the transportation of commodities rates in excess of those herein permitted to be charged by said Louisville & Nashville Railroad Company as shown by said Standard Local Scale of Rates.

"Provided, however, that where either of said defendants, the said Cincinnati, New Orleans & Texas Pacific Railway Company or said Southern Railway in Kentucky, now has in effect rates lower than those fixed by said standard scale, said defendants shall not charge, collect or receive rates in excess of said lower rates as now published by said defendants, respectively."

IX.

The complainant states that the effect of the order entered by the defendants on July 19, 1906, will be to reduce the revenue to be

derived by this complainant from the operation of its freight trains, such reduction being direct upon intrastate traffic, and indirect, but just as surely, upon interstate traffic; that the direct reduction of its revenue upon intrastate traffic will be an amount which the complainant can not accurately compute, but will be largely in excess of $2,000 a year—how much more, the complainant can not now say, and will be, and is, confiscatory in its character, and de-
13 prives the complainant of its property without due process of law, and devotes the property of the complainant to public use without just compensation.

The complainant states that for the year ending June 30, 1905, its total net earnings were.....	$235,485.79
That this was not an exceptional year.	
That its average net earnings for the ten years ending June 30, 1905, were.....	$156,590.99
That the cost of reproducing the property in Kentucky, of the complainant necessarily used by the company in its operation as a railway common carrier, would not be less than.....	$15,732,921.29
That its total gross earnings for operation in Kentucky for the fiscal year ending June 30, 1905, were	4,324,098.50
That the operating expenses, excluding taxes, were.	$3,184,719.13
That the operating cost, including taxes, to earn one dollar of revenue, was.....	76.33 per cent.
That this includes all traffic, interstate as well as intrastate.	
That its gross earnings for said year for intrastate traffic were	$638,479.22
Making the ratio of intrastate gross earning to total gross earning in Kentucky.....	15.00 per cent.
That the total gross earnings from freight for the aforesaid year were.....	$3,147,201.19
And the gross freight earnings from intrastate traffic were	$173,008.55
Making the ratio of intrastate gross freight earnings to total gross earnings.....	27.10 per cent.
That the taxes for the fiscal year ending June 30, 1905, were.....	$116,054.26

The complainant says that the operating cost to earn one dollar of intrastate revenue is largely greater than the operating cost to earn one dollar of total revenue or interstate revenue, but that it is difficult to state exactly what this addition should be.

14 The complainant states that, assuming that the same proportion of property should be considered as used in intrastate traffic, as intrastate earnings bear to total earnings, then if the property employed is taken at what it would cost to reproduce it, $15,732,921.29, 15.00 per cent. would be.....	$2,359,938.19

Taking intrastate gross earnings in Kentucky at the figure given above, $638,479.22, and applying the general operating cost, including taxes, 76.33 per cent., and adding 10.00 per cent. as minimum excess cost of conducting intrastate traffic, the operating expenses and taxes for conducting intrastate traffic are found to be.....	$551,199.11
Leaving net earnings even on the basis of 10.00 per cent. excess cost of conducting intrastate traffic only the sum of.....	$87,280.11

The complainant asks leave to show, during the progress of the cause, with more accuracy, a larger cost of operation in conducting intrastate traffic than 10.00 per cent. The complainant states that even if it is no greater (and complainant states it is largely greater) it will appear that the net revenue on the present scale of rates as applied by complainant is only 3.70 per cent. of the proportion of the cost of reproducing the property as given above, which shows a very small valuation of property devoted to intrastate traffic.

The complainant states that, such being the case, there was no reason for reducing any of complainant's rates; that there was no evidence tending to show that any one of said rates was either unjust, unreasonable or extortionate, nor was it charged specifically that any one of said rates was either unjust, unreasonable or extortionate.

The complainant states that its rates and each of them were in and of themselves just and reasonable, and that the return to the complainant upon the value of its property was far from that which it was entitled to receive, and any reduction of such return is in its nature confiscatory, and is a deprivation of the complainant
15 of its property without due process of law, and violative of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto.

X.

The complainant further states that if the defendants had the right to make a general schedule of freight rates and compel the complainant to conform thereto, without determining as to the several rates by competent allegation and proof, that they were in and of themselves unjust, unreasonable and extortionate, and if the said defendants had the right to have an inquiry in one proceeding as to all the roads joined in the amended complaints of the said Guenther and the Louisville Veneer Mills and the intervening petition of the Commonwealth of Kentucky, then the defendants had no right or authority to make a tariff of rates which would be applicable to each railroad in so far as such tariff was lower than or equal to the rate charged by such railroad, and at the same time to forbid this complainant and the other railroads from charging a rate equal to that prescribed in the said tariff on all classes embraced therein, and the said defendants had no right to forbid this complainant from advancing rates which it had in effect at the time the said defendants entered their order herein, to the extent of equalizing them with the rates fixed by the defendants in their general scale

of rates and charges. Thus the complainant says that while in a large number of cases the rates which it now charges are higher than those fixed by the said order of July 19, 1906, adopting what is called "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," and which, by the said order entered July 19, 1906, is made applicable to this complainant, yet in various instances this complainant is now charging rates lower than the rates fixed by said Standard Tariff, and the said defendants do not adjudge that any rate lower than that fixed in said Standard Tariff is unjust, unreasonable or extortionate, but at the same time they forbid this
16 complainant from changing such rate, for no other reason than that at the present time the complainant charges such rate.

The complainant states that each railroad in Kentucky makes certain exceptions from its classification, charging lower rates for certain distances and from and to certain points upon certain articles embraced within one or the other of the various numbered or lettered classes.

The complainant says that the purpose and effect of the order of July 19, 1906, is to fix certain rates for one railroad and lower rates for other railroads, without any regard to or any inquiry as to any difference in circumstances or condition, but simply based upon the accidents that the tariffs of the said several railroads differ as between themselves in the manner above described.

The complainant states that whether the action of the said defendants be regarded as executive, legislative or judicial, it is special, partial, unjustly discriminatory, and violative of the Constitution of Kentucky in that it is special legislation and in that it is a taking or applying to public use of property without just compensation, and violative of the Constitution of the United States in depriving the complainant of its property without due process of law and denying to it the equal protection of the law as guaranteed by the said Constitution and particularly by the Fourteenth Amendment thereto.

XI.

The complainant states that the said act under which the said defendants are attempting to proceed is violative of the Constitution of the State of Kentucky, and particularly of Sections 27, 28, 109 and 135 thereof, in that an attempt is made to vest in the defendants, as a railroad commission, powers executive, legislative and judicial, and that it is violative of the Constitution of the United States, Subsection 3, Section 8 of Article I of that instrument, because it attempts to deal with interstate as well as intrastate traffic; that it is violative of the Constitution of the State of Kentucky and the Consti-
17 tution of the United States, and particularly Section 1 of Amendment XIV, in that it is applicable alone to railroad companies and not to all common carriers; and denies to railroad companies the protection of the law equal to that enjoyed by other common carriers; and that it is violative of Section 17 of the Constitution of the State of Kentucky and Article VII of the Amendments to the Constitution of the United States in that it endeavors to impose fines which are excessive.

XII.

Complainant states that the amended complaint of the said Guenther and others, and the intervening petition of the said Louisville Veneer Mills and others, and the Commonwealth of Kentucky, purported to be against the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Chesapeake & Ohio Railway Company, the Southern Railway Company in Kentucky, the Lexington & Eastern Railroad Company, the Louisville & Atlantic Railroad Company and all other railroads that operate their lines in the State of Kentucky; that the said order of the Commission is directed only against the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway in Kentucky, the Chesapeake & Ohio Railway Company and the Nashville, Chattanooga & St. Louis Railway Company (a company not specifically named but included in the general designation of "all other railroads that operate their lines in the State of Kentucky"); that the defendants made no order against the Lexington & Eastern Railroad Company, the Louisville, Henderson & St. Louis Railway Company, the Louisville & Atlantic Railroad Company, nor sundry other railroads having and operating lines in the State of Kentucky, although the said named railroads and divers of the said unnamed railroads have in force and effect rates
18 higher than those of the complainant and higher than those prescribed in the said order to be observed by the six railroads embraced in the said order, and which rates are charged under substantially similar circumstances and conditions to some one or other of the railroads named in said order; and complainant says that the said order is partial, unjust and discriminatory and beyond the power and authority of the said Railroad Commission.

XIII.

The complainant states that it files herewith as part hereof a duly certified copy of the opinion and order of the said defendants hereinbefore referred to, and which, as above stated, was entered on July 19, 1906. No copy thereof was served upon this complainant until after said date.

The complainant says that if it shall refuse to put into effect the said rates as required by the said order the said defendants threaten to and will cause a large number of proceedings to be instituted against this complainant in the Franklin Circuit Court and in the circuit court- of the several counties through which the complainant's road is operated, and will subject this complainant to a multitude of prosecutions, and will endeavor to cause large penalties to be inflicted upon this complainant; and the complainant says that the said statute under which the defendants are pretending to act provides no means by which this complainant can challenge the reasonableness of the rates embraced in the said order, and that it will be impossible for complainant to make an adequate defense before the large numbers of juries which will be called to try said cases;

that the number of rates now charged by complainant, which must be changed by reason of said order, is very great; and so it is that complainant has no adequate remedy at law and is of necessity bound to apply to this Honorable Court for equitable relief in the premises.

19 XIV.

Wherefore, complainant prays that the said defendants, their agents, servants and employés, and all other persons be perpetually enjoined and restrained from requiring the complainant to put into force the rates set forth in the said order, or any of them, or from entering any complaint against complainant in any court on account of its disobedience of said order, or from recommending, seeking or asking any indictment, prosecution, penal action or other procedure against the complainant or any of its officers, agents, servants or employés, on account of any disobedience by the complainant or its officers, agents, servants or employés, of the terms of said order; and the complainant prays that the said order be declared in all respects null and void and beyond the authority of the said defendants, and of no force or effect as against this complainant. And your complainant prays that during the pendency of this suit and until a final decree can be had, an interlocutory injunction issue against the said defendants, their agents, servants and employés, in terms and to the effect of the final injunction as above prayed.

And complainant prays that there be granted unto your complainant a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the said defendants, McChord, Ferguson and Siler, individually and as Railroad Commissioners aforesaid, commanding them on a day certain, to be named therein, and under a certain penalty, to be and appear before this Honorable Court, and then and there to answer, but not under oath (such oath being hereby expressly waived), all and singular the premises, and to stand to, perform and abide by such order, direction and decrees as may be made against them in the premises, and as shall seem to Your Honors to be meet and agreeable to equity and good conscience; and your complainant will ever pray.

JOHN GALVIN,
MAURICE L. GALVIN,
Attorneys for Complainant.

20 UNITED STATES OF AMERICA,
State of Ohio, Hamilton County, ss:

George P. Biles, being first duly sworn, states that he is the General Freight Agent of the Cincinnati, New Orleans & Texas Pacific Railway Company, the complainant above named; that he has read the foregoing bill and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

GEORGE P. BILES.

Comparison of Old Rates with Maximum Rates.

Kentucky Railroad Commisson's Standard Tariff No. 1.

APPLICABLE TO THE LOUISVILLE & NASHVILLE RAILROAD CO.

DISTANCES.	In Cents Per Hundred Pounds.												Per Bbl.	Per 100 lbs.	Car Lo Per 100	
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M
For 10 miles and less	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3
	12	10	9	8	7	6	6	6	5	5	6	6	10	6	5	4
Over 10 miles and not over 15	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4
	15	13	12	11	10	9	9	9	6	6	9	9	12	9	6	5
15 miles and not over 20	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5
	20	17	15	13	12	11	11	11	7	7	11	11	14	11	7	6
20 miles and not over 25	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5
	23	20	17	15	14	13	13	13	9	8	13	13	18	13	9	7
25 miles and not over 30	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5
	26	23	20	17	16	15	15	15	10	8	15	15	20	15	10	7
30 miles and not over 35	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6
	29	25	22	19	18	17	17	17	11	9	17	17	22	17	11	8
35 miles and not over 40	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6
	32	27	24	21	20	19	19	19	12	9	19	19	24	19	12	8
40 miles and not over 45	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6
	35	30	27	23	22	21	21	21	13	10	21	21	26	21	13	8
45 miles and not over 50	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7
	37	32	28	25	24	22	22	22	14	10	22	22	28	22	14	9
50 miles and not over 55	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8
	39	34	30	26	25	23	23	23	15	11	23	23	30	23	15	10
55 miles and not over 60	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9
	41	35	31	28	26	24	24	24	16	11	24	24	32	24	16	12
60 miles and not over 65	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9
	43	37	33	30	27	25	25	25	17	12	25	25	34	25	17	12
65 miles and not over 70	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10
	45	39	34	31	28	26	26	26	17	12	26	26	34	25	17	13
70 miles and not over 75	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10
	47	41	36	32	29	27	27	27	18	13	27	27	36	25	18	13
75 miles and not over 80	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11
	49	42	37	33	30	28	28	28	18	14	28	28	36	25	19	14
80 miles and not over 85	38	33	29	26	23	22	22	32	14	11	22	22	28	19	14	11
	51	44	39	34	31	29	29	29	19	15	29	29	38	25	19	14
85 miles and not over 90	40	34	30	26	24	23	23	23	14	11	23	23	38	19	14	11
	53	45	40	35	32	30	30	30	19	15	30	30	38	25	19	15
90 miles and not over 95	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11
	54	46	41	36	32	30	30	30	19	15	30	30	38	25	19	15
95 miles and not over 100	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11
	55	47	42	37	32	30	30	30	20	15	30	30	40	25	20	15
100 miles and not over 110	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12
	56	48	43	38	33	31	31	31	20	15	31	31	40	26	21	16
110 miles and not over 120	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12
	58	50	44	39	34	32	32	32	21	16	32	32	42	26	22	16

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Applicable to the Louisville & Nashville Railroad Co.—Continued.

DISTANCES.	In Cents Per Hundred Pounds.												Per Bbl.	Per 100 lbs.	Car Loads Per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
120 miles and not over 130	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
	60	52	46	41	36	33	33	33	21	16	33	33	42	27	23	17	12
Over 130 miles and not over 140	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
	62	53	47	42	37	34	34	34	22	17	34	34	44	27	24	17	12
140 miles and not over 150	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
	64	55	49	44	39	36	36	36	22	17	36	36	44	28	25	18	13
150 miles and not over 160	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
	66	57	50	45	40	37	37	37	23	18	37	37	46	28	26	19	13
160 miles and not over 170	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
	68	59	52	47	42	38	38	38	23	18	38	38	46	29	27	19	14
170 miles and not over 180	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
	70	60	53	48	43	39	39	39	24	19	39	39	48	29	28	20	15
180 miles and not over 190	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
	72	62	54	49	44	40	40	40	24	19	40	40	48	30	29	20	15
190 miles and not over 200	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
	74	64	55	50	45	41	41	41	25	20	41	41	50	30	30	21	16
200 miles and not over 210	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
	76	65	56	51	46	42	42	42	25	20	42	42	50	30	31	21	16
210 miles and not over 220	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
	78	67	57	52	47	43	43	43	26	20	43	43	53	31	32	22	17
220 miles and not over 230	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
	80	69	58	53	48	44	44	44	26	20	44	44	53	31	33	23	17
230 miles and not over 240	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
	82	71	59	54	49	45	45	45	27	21	45	45	54	31	34	23	18
240 miles and not over 250	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
	84	72	60	55	50	46	46	46	27	21	46	46	54	33	36	23	18
250 miles and not over 275	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
	87	75	61	56	51	47	47	47	28	22	47	47	56	32	38	24	19
275 miles and not over 300	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
	90	77	62	57	52	48	48	48	28	22	48	48	56	32	39	25	20
300 miles and not over 325	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
	93	79	63	58	53	49	49	49	29	23	49	49	58	32	40	26	21
325 miles and not over 350	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
	96	81	64	59	54	50	50	50	29	23	50	50	58	33	42	27	22
350 miles and not over 375	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
	99	83	65	60	55	51	51	51	30	24	51	51	60	33	44	28	23
375 miles and not over 400	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
	102	85	66	61	56	52	52	52	30	24	52	52	60	33	46	29	24
400 miles and not over 425	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
	104	86	67	62	57	53	53	53	32	25	53	53	64	34	47	30	25
425 miles and not over 450	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19
	106	87	68	63	58	54	54	54	34	25	54	54	68	34	48	30	25

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Comparison of Old Rates with Maximum Rates.
Kentucky Railroad Commission's Standard Tariff No. 2.
APPLICABLE TO THE ILLINOIS CENTRAL RAILROAD CO.

DISTANCES.	In Cents Per Hundred Pounds.												Cts. per M.	In Cents Per 100 Lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
For 10 miles and less	10 25	8 21	7 17	6 15	6 13	5 11	5 9	5 11	4 10	4 10	5 14	5 15	8 20	4 11	4 11	3 5	2 4½	2 4
Over 10 miles and not over 15	12 31	10 26	10 21	9 19	8 17	7 14	7 12	7 14	5 13	5 12	7 17	7 20	10 26	5 14	5 14	4 5	3 5	3 5
15 miles and not over 20	16 31	14 26	12 21	10 19	10 17	9 14	9 12	9 14	6 13	6 12	9 17	9 20	12 26	6 14	6 14	5 5	4 5	4 5
20 miles and not over 25	17 37	15 31	13 25	11 22	11 19	10 16	10 15	10 16	7 15	6 14	10 19	10 22	14 30	7 16	7 16	5 7	4 6	4 6
25 miles and not over 30	20 37	17 31	15 25	13 22	12 19	11 16	11 15	11 16	8 15	6 14	11 19	11 22	16 30	8 16	8 16	5 7	5 6	5 6
30 miles and not over 35	22 41	19 34	17 28	14 25	14 22	13 19	13 18	13 20	8 17	7 16	13 21	13 25	16 34	8 16	8 16	6 8	5 6	5 6
35 miles and not over 40	24 41	20 34	18 28	16 25	15 22	14 19	14 18	14 20	9 17	7 16	14 21	14 25	18 34	9 16	9 16	6 8	5 6	5 6
40 miles and not over 45	26 45	23 38	20 31	17 28	17 25	16 22	16 24	16 24	10 20	8 18	16 24	16 29	20 40	10 17	10 17	6 9	5 7	5 7
45 miles and not over 50	28 45	24 38	21 31	19 28	18 25	17 22	17 24	17 24	11 20	8 18	17 24	17 29	22 40	11 17	11 17	7 9	5 7	5 7
50 miles and not over 55	29 49	26 41	23 35	20 31	19 27	17 24	17 26	17 26	11 21	8 19	17 25	17 31	22 42	11 18	11 18	8 10	5 8	5 8
55 miles and not over 60	31 49	26 41	23 35	21 31	20 27	18 24	18 26	18 26	12 21	8 19	18 25	18 31	24 42	12 18	12 18	9 10	6 8	6 8
60 miles and not over 65	32 53	28 44	25 36	23 32	20 28	19 26	19 28	19 28	13 22	9 20	19 26	19 32	26 44	13 18	13 18	9 11	6 9	6 9
65 miles and not over 70	34 53	29 44	26 36	23 32	21 28	20 26	20 28	20 28	13 22	9 20	20 26	20 32	26 44	13 18	13 18	10 11	6 9	6 9
70 miles and not over 75	35 55	31 46	27 37	24 33	22 30	20 28	20 28	20 28	14 23	10 21	20 28	20 34	28 46	14 20	14 20	10 12	7 9	7 9
75 miles and not over 80	37 55	32 46	28 37	25 33	23 30	21 28	21 28	21 28	14 23	11 21	21 28	21 34	28 46	14 20	14 20	11 12	7 9	7 9
80 miles and not over 85	38 58	33 48	29 39	26 35	23 32	22 30	22 30	22 30	14 25	11 22	22 28	22 35	28 50	14 20	14 20	11 12	7 9	7 9
85 miles and not over 90	40 58	34 48	30 39	26 35	24 32	23 30	23 30	23 30	14 25	11 22	23 28	23 35	28 50	14 20	14 20	11 12	8 9	8 9
90 miles and not over 95	41 60	35 50	31 41	27 36	24 32	23 30	23 30	23 30	14 26	11 23	23 30	23 36	28 52	14 21	14 21	11 13	8 9	8 9
95 miles and not over 100	41 60	35 50	32 41	28 36	24 32	23 30	23 30	23 30	15 26	11 23	23 30	23 36	30 52	15 21	15 21	11 13	8 9	8 9
100 miles and not over 110	42 61	36 51	32 42	29 37	25 33	23 31	23 31	23 31	15 27	11 24	23 31	23 37	30 54	16 22	16 22	12 14	8 10	8 10

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Applicable to the Illinois Central Railroad Co.—Continued.

DISTANCES.	In Cents Per Hundred Pounds.												In cts. per bbl.	In Cents Per 100 Lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
110 miles and not over 120	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8
	62	52	42	37	33	32	32	32	27	24	32	37	54	22	22	15	10	10
120 miles and not over 130	45	39	35	31	27	25	25	25	16	12	25	25	32	17	17	13	9	9
	64	53	43	38	34	33	33	33	28	24	33	38	56	23	23	15	10	10
Over 130 miles and not over 140	47	40	35	32	28	26	26	26	17	13	26	26	34	18	18	13	9	9
	65	54	44	39	35	34	34	34	28	24	34	38	56	24	24	15	10	10
140 miles and not over 150	48	41	37	33	29	27	27	27	17	13	27	27	34	19	19	14	10	10
	66	56	45	41	36	35	35	35	30	25	35	38	60	25	25	16	11	11
150 miles and not over 160	50	43	38	34	30	28	28	28	17	14	28	28	34	20	20	14	10	10
	66	57	46	42	37	36	36	36	32	25	36	38	64	26	26	16	11	11
160 miles and not over 170	51	44	39	35	32	29	29	29	17	14	29	29	34	20	20	14	11	11
	68	59	48	44	39	38	38	38	33	25	38	40	66	28	28	17	12	12
170 miles and not over 180	53	45	40	36	32	29	29	29	18	14	29	29	36	21	21	15	11	11
	70	61	50	46	40	39	40	40	34	25	39	41	68	29	29	17	12	12
180 miles and not over 190	54	47	41	37	33	30	30	30	18	14	30	30	36	22	22	15	11	11
	71	62	51	47	41	40	41	41	34	25	40	42	68	30	30	17	12	12
190 miles and not over 200	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12	12
	72	63	52	48	42	40	42	42	34	25	40	42	68	30	30	17	12	12
200 miles and not over 210	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12	12
	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
210 miles and not over 220	59	50	43	39	35	32	32	32	20	15	32	32	40	24	24	17	13	13
	76	66	55	50	44	42	44	44	35	25	42	44	70	32	32	18	13	13
220 miles and not over 230	60	52	44	40	36	33	33	33	20	15	33	33	40	25	25	17	13	13
	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
230 miles and not over 240	62	53	44	41	37	34	34	34	20	16	34	34	40	26	26	17	14	14
	79	69	57	52	46	44	46	46	36	25	44	46	72	34	34	18	13	13
240 miles and not over 250	63	54	45	41	38	35	35	35	20	16	35	35	40	27	27	17	14	14
	82	72	59	54	48	46	48	48	36	25	46	48	72	36	36	18	13	13
250 miles and not over 275	65	56	46	42	38	35	35	35	21	17	35	35	42	29	29	18	14	14
	85	75	61	56	50	47	49	49	36	25	48	49	72	38	38	18	13	13
275 miles and not over 300	68	58	47	43	39	36	36	36	21	17	36	36	42	29	29	19	15	15
	88	77	63	57	52	48	50	50	36	25	50	50	72	39	39	18	13	13
300 miles and not over 325	70	59	47	44	40	37	37	37	22	17	37	37	44	30	30	20	16	16
	91	79	64	58	53	49	51	51	36	26	51	51	72	41	41	19	14	14

Black Figures are the Reduced Rates. **Figures in Red are the Old Rates.**

Sworn to before me and subscribed in my presence this 24th day day of July, 1906.

[SEAL.] J. V. BRYANT,
Notary Public.

Clerk's endorsement:
Filed July 25th, 1906.

W. G. CHAPMAN, *Clerk.*

Exhibit, filed with the foregoing Bill of Complaint, is in words and figures as follows, viz:

21

OPINION AND ORDER

OF THE

RAILROAD COMMISSION

GOVERNING RATES

ON

GENERAL MERCHANDISE ON RAILROADS IN KENTUCKY.

THE COMMONWEALTH OF KENTUCKY, &C., Plaintiffs,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

C. C. McChord, Chairman.

McD. Ferguson, Com. First Dist. A. T. Siler, Com. Third Dist.

Louisville:
Geo. G. Fetter Company.
1906.

(Here follow facsimiles, marked pp. 22, 23, 24, and 25.)

26 Before the Railroad Commission.

THE COMMONWEALTH OF KENTUCKY, &c., Plaintiffs,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD CO. AND ALL OTHER RAILROAD CORPORATIONS IN THE STATE OF KENTUCKY, Defendants.

Opinion and Order of the Commission.

The several complaints which, for convenience, have been consolidated and heard together in this investigation, raise for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon all railroads to and from all points within the State. Throughout the entire investigation this Commission has not been unmindful of the very great importance of the issues involved to the shippers and consumers throughout the Commonwealth as well as the railroads. It has been our endeavor to ascertain the truth in order that we might intelligently discharge our duties under the law. And we approach the determination of this exceedingly important case fully impressed with the magnitude of the responsibility thus devolved upon the Commission and the propriety of rendering a decision, which, under a broad view of all the attending circumstances, may be characterized as fair and just.

The annual reports of all the railroads for the fiscal year ended June 30, 1905, show the total mileage in the State to be 3,374, the total gross receipts $34,856,447, total net receipts $9,754,957. The valuation placed by the Railroad Commission upon all the tangible property of these railroads was for the year indicated $61,149,924.

27 Our investigation of the rate situation shows that all rates charged by the railroads in Trunk Line and Central Freight Association territory, which is that territory north of the Ohio and east of the Mississippi rivers, to and from points on the Ohio river are very much lower than are the rates south of the Ohio river. Through rates are made to the Ohio river, but to points south of the Ohio river the full local rates are added to the through rates. We find that the principal portion of Kentucky is served by the Louisville & Nashville, the Illinois Central, the Southern Railway in Kentucky, the Cincinnati, New Orleans & Texas Pacific and the Chesapeake & Ohio Railway.

As regards the adjustment of rates, we find that the present rates upon all these railroads have been in effect for many years. In fact, very few changes in rates have been made except to occasionally lower or raise some of them, notwithstanding the fact that the volume of business has very greatly increased and the receipts of all the roads have steadily grown and the remarkable improvement in motive power and equipment enables them to handle the traffic with much less labor and cost proportionate to the volume of business done.

The lowest rates charged by any of the defendants are those charged by the Cincinnati, New Orleans & Texas Pacific Railway

Company, and this road has forced the Louisville & Nashville Railroad Company on its Kentucky Central Division, embracing 254 miles, and also the Southern Railway in Kentucky, to meet its rates. It is claimed by the defendants that the rates charged by the Cincinnati, New Orleans & Texas Pacific Railway Company are entirely too low, and the fact is cited that some years ago this road was forced into bankruptcy, and that the Kentucky Central Division of the Louisville & Nashville Railroad Company, which was formerly an independent corporation, was likewise forced into bankruptcy, as was also the Louisville Southern Railway, now the Southern Railway in Kentucky. It is earnestly contended that it would not be fair to require the other railroads in the State to reduce their rates to those charged by the Cincinnati, New Orleans & Texas Pacific Railway Company.

It is true these roads were at one time forced into the hands of a receiver, but for years past they have been prosperous and money-makers. In fact, the defendant, the Louisville & Nashville Railroad Company, which is conceded to be a good business institution, purchased the Kentucky Central Railroad, knowing that it would be compelled to charge the low rates forced upon it by the Cincinnati, New Orleans & Texas Pacific Railway Company. Under this adjustment of rates this latter road serves points like the city of Cincinnati and patrons on its line, with but few exceptions, at rates 25 per cent. lower than the Louisville & Nashville and Illinois
28 Central serve their patrons out of the city of Louisville and patrons on their lines, except that to points on the Kentucky Central Division of the Louisville & Nashville south of Paris, the Louisville & Nashville Railroad Company serves its patrons out of Louisville at the Cincinnati rate.

It will thus be seen that under the present adjustment of rates one section of the State is served upon better terms than the others. It is argued that the various communities throughout the State and business institutions have been built up and fostered under the present adjustment of these rates, and that any radical departure from this adjustment would be disastrous not only to the shippers, but to the communities served by the railroads.

The Commission has endeavored to weigh all the facts and to familiarize itself with the conditions as they actually exist, and we do not believe any such disastrous results will follow the conclusions we have reached in this investigation.

The several complaints herein allege that all the rates upon all the railroads in the Commonwealth of Kentucky are unjust, unreasonable, extortionate and discriminatory. In view of the fact that most of the traffic in Kentucky is carried, and a greater portion of the State is traversed and served by six of the principal railroads, to-wit: The defendants, the Louisville & Nashville, the Illinois Central, the Chesapeake & Ohio, the Louisville, Henderson & St. Louis, the Cincinnati, New Orleans & Texas Pacific and the Southern Railway in Kentucky, this investigation has, so far, been mainly confined to these six roads. Copies of each complaint were furnished to the defendants, all of whom filed answers in which each and all

denied that their rates as a whole or any part thereof are either unjust, unreasonable, extortionate, or discriminatory.

In order to intelligently pass upon these questions and to enable the Commission to have all information possible to be obtained bearing upon the question of rates and the operation of the railroads, a series of questions was propounded to each of the defendants pertaining to their capitalization, construction, operation, value and general conduct of their business as common carriers in relation to traffic wholly within the State. The defendants were requested to furnish statements showing the actual amount of freight and passenger traffic in Kentucky, both intrastate and interstate, the receipts, the cost of operation, and all other operating statistics for the year 1905. After these questions were propounded the defendants represented to the Commission that to furnish this information for the entire year would cause a delay of nearly twelve months and involve a vast amount of labor and expenditure of a large sum of money. It was therefore, agreed that four representative months should be selected, and that the information called for should be esti-
29 mated for the entire year upon the showing for the months so selected. The defendant, the Louisville & Nashville Railroad, operating the largest mileage in the State, 1,265 miles, supplied the required information in greatest detail, though by no means as full and satisfactory as might have been expected, while the other defendants failed to furnish the information requested in such form and extent as to equal in value that furnished by the Louisville & Nashville. Indeed, in the whole conduct of this case, the burden of justification laid upon all the defendants has been largely borne by the Louisville & Nashville Railroad.

A number of extended hearings have been had, and each defendant has been given the widest latitude and the fullest opportunity to justify the rates in issue, and all have been urged to furnish to the Commission all facts having a tendency to throw light upon the subject and to facilitate bringing out everything pertinent to the inquiry.

The Commission understands that the theory of the defense of each of the defendants, and particularly that of the Louisville & Nashville Railroad, is based upon the plan which seems to have been agreed upon by complainants and the railroads in the case of Smyth *v.* Ames, wherein the percentage of operating expenses to gross receipts in Nebraska was used to measure the cost of doing all the business. The defendants herein have fallen into the same error that was committed in the Nebraska case, as we shall hereinafter endeavor to demonstrate. However, certain general rules or principles are stated by the Supreme Court of the United States in the cases of Smyth *v.* Ames, 169 U. S., 466, and the Minneapolis & St. Louis Railroad Co. *v.* Minnesota, 186 U. S., 267, and which, taken together, appear to embrace the following propositions:

1. The value of the property used by the carrier in the service must be ascertained, or, at least, justly estimated.

2. While the amount and value of the stock and bonds must be considered, such amount and value are in no way conclusive upon

the question of the actual property value, as the amount and market value of stocks and bonds can only bear upon that question by way of comparison. The actual property value is the cost of reproduction with such deductions therefrom as may be necessary to represent depreciation and thereby indicate the present condition
30 of the property. If the actual property value is independently determined, that value can not be increased or decreased by the amount of securities the company has seen fit to issue.

3. A sufficient return from operation must be allowed to provide for necessary operating expenses and for taxes as a current yearly charge, and the operating expenses include such renewals and repairs as are necessary to keep up the property.

4. While the allowance should be made to pay a proper return upon the ascertained fair valuation of the property used in the service involved, it must always depend upon the circumstances of the road, manner and method of its operation, the character and amount of the traffic involved, and the extent to which the question is affected by the paramount right of the public to enjoy reasonable transportation charges.

These principles are all definitive of the prohibition in the Federal Constitution that no person shall be deprived of his property without due process of law or be denied the equal protection of the laws. While this restriction exists and must not be invaded, the decisions of the court of last resort give finality to the action of the State, acting through its Legislature, or a commission exercising properly delegated powers.

It was apparently contended in the Smyth-Ames case on behalf of those attacking the Nebraska rates fixed by the Legislature, just as it is here, that it cost from 10 to 25 per cent. more to conduct the purely intrastate business than it did to conduct the average of all business within the State, and that this excess cost or per cent. should be added to the proportion of operating expenses to gross receipts for all traffic to indicate the cost to the carrier for the intrastate business. But it does not appear that this contention was seriously disputed or opposed in any such way as to attract the attention of the court. In other words, this theory for ascertaining the cost of doing the State traffic seems to have been conceded by counsel for the State as well as for the railroads in the Nebraska case. The only point of difference regarding this proposition seems to have been that counsel for the State of Nebraska contended that the gross receipts and the operating expenses from all traffic within the State of Nebraska should be considered, whereas the contention of the attorneys for the railroad was that only the purely State
31 traffic should be considered without reference to what the roads earned upon interstate traffic, or what it cost to produce the interstate traffic. It may be true that the rates charged on the purely State business in Nebraska may have been already so low that taken in gross as represented in total earnings from that business and compared with the actual expenses for doing the intrastate business, the percentage of these expenses to these earnings was, in fact, at least 10 per cent. more than the percentage of operating expenses to earnings from all traffic.

However this may be, we are of the opinion that the theory of those acting for the carriers in the Nebraska case, as is the theory advanced by council in the case at bar, that the percentage of operating expenses to gross receipts represents cost, was, and is, wholly untenable.

The answers and statements made by the defendants embrace claims of greater cost of operation for the purely State freight traffic ranging from 10 to 25 per cent. above the average cost of doing all the State and interstate business of Kentucky on their respective lines. The defendants have insisted upon a method of stating this increase cost which calls for discussion of this opinion. The Louisville & Nashville, though doing a much larger State freight business than any other carrier in Kentucky; and whose aggregate traffic also greatly exceeds that of any other defendant, asserts that the greater cost of doing the State freight business amounts to 25 per cent., and in stating its claim this company takes the percentage of its total operating expenses to total earnings in Kentucky, State and interstate included, which is reported as 69.16 per cent. and adds 25 per cent. thereto to cover the cost of the State business. This amounts to 94.16 per cent. of the total earnings from intrastate freight in Kentucky. And to this it also adds a proportion of the State taxes amounting to 3.42 per cent., giving a total of 97.58 per cent. of the gross earnings on State freight as its asserted cost of carrying such freight.

The fallacy of these claims lies in the fact that 69.16 per cent. does not stand for total cost at all, nor for any part of the cost. The factor 69.16 simply represents the relation between the total cost expressed in dollars and cents and the total receipts expressed
32 in dollars and cents. The cost and the earnings may both be high or both be low, and yet the same relation may exist. The cost of doing a particular part of the whole traffic may be more than the average cost, and yet the per cent. of that cost to high earnings on that particular traffic may be less than the percentage of the whole cost to the gross earnings. The expense, or cost, to the carrier of a given amount of transportation has no necessary connection with the earnings, or profits derived from that transportation. Since the cost, either total or average, is ascertainable solely from its own elements, it can never be expressed by percentage.

Suppose a line of road carried for a given period only three tons of freight and no passengers, its total operating charge being applicable to the earnings of those three tons, and assume the following costs and charges for each ton:

A. One ton, cost.....	70 cents.	Earnings or charge.....	90 cents.
B. One ton, cost.....	60 cents.	Earnings or charge.....	80 cents.
C. One ton, cost.....	20 cents.	Earnings or charge.....	80 cents.
Three tons, cost.....	**$1.50.**	**Total earnings or charges.**	**$2.50**

The percentage of the operating expenses, or total cost, to the total or gross earnings would be ($1.50 divided by $2.50) 60 per cent.

The general or average cost would be ($1.50 divided by 3), 50 cents per ton. Now, suppose it is desired to state by percentage how much more "ton A cost than the general or average cost of 50 cents. Knowing the cost of "ton A" to be 70 cents, and the general cost to be 50 cents, it is readily found that the difference is 40 per cent. It can, therefore, be claimed, and by correct mathematics demonstrated, that "ton A" cost the carrier to transport it, 40 per cent. more than the general average cost.

Now, if it is desired to state by percentage the cost of "ton A" (70 cents) to the earnings or charge for the transportation (90 cents), the percentage is easily found by dividing 70 cents by 90 cents, with a result of 77.77+per cent., or 17.77+per cent.
33 in excess of the 60 per cent. relation of total expenses to gross earnings.

In the same way, and by the same rule of computation, "ton C," which cost the carrier only 20 cents to transport and yield an earning charge of 80 cents, shows a percentage of cost to the earning charge of only 25 per cent., or 35 per cent. less than the 60 per cent. relation of the total expenses to gross earnings.

If, instead of ascertaining the true percentage of cost to the earning charge for *ton* "ton A" to be 77.77+per cent., a claim is set up that "ton A" costs 40 per cent. more than the general or average cost, and should on that account be added to the percentage of total operating expenses to gross earnings (60 per cent.), the addition makes the claimed cost of "ton A" (40 per cent. plus 60 per cent.) 100 per cent. and consequently that "ton A" was carried without any profit whatever.

Carrying the illustration to its logical conclusion, the same comput-tion must be made for "Ton C," which cost 20 cents to transport, and 30 cents less than the average or general cost of 50 cents. This difference of 30 cents is 60 per cent. of the general or average cost. If the cost above the general average or average cost of "ton A" is to be added to the percentage of total operating expenses to gross earnings (60 per cent.), then for "ton C" the cost of its transportation below the general or average cost must be deducted from the percentage of total operating expenses to gross earnings (60 per cent.). As the cost of "ton C" is 60 per cent. less than the general or average cost, it follows, by this rule, that it costs nothing whatever to transport "ton C," and that the charge received for its earnings was all profit. The foregoing illustration, or example, we think, puts before the mind in the simplest form the wide distinction between actual cost or actual general cost on the one hand, and on the other hand percentage of total cost to total earnings, and shows, *reductio ad absurdum*, the total inadmissibility of the defendants' claim for a minimum cost to it for doing the intra-state Kentucky business represented by adding 25 per cent. to 69.16 per cent. (the percentage of all expenses to all earnings) and making a total of 94.16 per cent., to which it adds taxes, 3.42

per cent. asserts a total cost of that business of 97.58 per cent. A claim of 28 per cent. additional and on this basis, instead of 25 per cent. would have extinguished every vestige of profit and put it in the position of transporting the large intra-state traffic in Ken-
34 tucky at a positive loss, thereby adding unjustly to the burden of the interstate business.

The examples above given show that the ratio of operating expenses to earnings is in no sense the statement of the actual cost, and the cost can not, viewed by itself, be expressed by percentage at all. Whatever the facts as to the actual cost may have been in the Nebraska case, it is, we think, quite clear that in this case the cost is one thing and the percentage or ratio of expenses to earnings is an altogether different thing, and that neither can be used to express or indicate the other. It is not too much to say of the Nebraska case that the contentions of the attorneys for the State were directed chiefly to establish the proposition that the action of the State could not be declared invalid unless the rates fixed should result in a loss from the operation of the road in all business, interstate as well as State, and that the assertion of the State's authority played a principal part in their arguments, resulting possibly in failure to analyze the testimony or to supply necessary testimony on behalf of the State.

With all this, however, the Kentucky Commission has nothing to do. Whether the theory of the defense as applied to the facts of the case is correct or incorrect, and what the actual situation is, are the chief matters for determination in respect of cost. That such theory of the defense is altogether inadmissible is plain from the foregoing analysis.

We are of the opinion that the term or factor used by the defendants for the purpose of stating the cost of doing the State freight business and all statements submitted which are based upon the use of that term or factor, can not be accepted.

At the request of the Commission, the defendant, the Louisville & Nashville Railroad, submitted a statement showing in detail its apportionment of operating expenses between passenger and freight business. We have endeavored to make a fair analysis of this statement, in order to arrive at a fair approximation of the cost to that defendant for doing the freight service in Kentucky during the year 1905, upon a ton-mile basis, which is the correct basis, and have endeavored to so apportion this cost as to show the relative cost per ton-mile of intra-state and interstate freight traffic. This analysis shows that there is properly chargeable to such freight traffic the sum of $6,535,753.09, of which there is chargeable to haulage or transportation proper, $5,014,823.22, and to services other
35 than haulage or transportation $1,520,929.87. The sum total of the items charged against haulage, is $5,014,823.22, is fairly apportionable between State freight and interstate freight upon the basis of ton-miles of haul of each, while the sum total of all other items, $1,520,929.87 is fairly apportionable between these two classes of freight upon the basis of tons of each.

The total number of tons of freight carried, both State and inter-

state, within the State of Kentucky during the year in question is, according to the returns of the defendant, 9,358,270, and the total number of ton-miles of transportation during the same period within the State of Kentucky is 1,291,340,617. The average haul of State freight was 96.97 miles. The average haul of interstate freight was 148.82 miles. Dividing that portion of the charge, $1,520,929.87, the amount to be apportioned upon the basis of tons, by the total number of tons, 9,358,270, gives an average charge per ton for station, loading and unloading, advertising, damage, and the like, *i. e.*, for all services except haulage, of 16.25 cents. This charge being divided by the average haul of the State traffic (97.96) gives the corresponding charge per ton mile against State traffic on account of all services except haulage, amounting to .1659 cents. Dividing the same average charge per ton by the length of haul upon the interstate traffic, 148.82 miles, gives the average charge for this portion of the interstate service, .1092 cents.

The total charge for haulage, $5,014,823.22, divided by the number of ton-miles of haul, which is 1,291,340,617, gives the haulage charge per ton-mile, .3884 cents. Adding to this for the State traffic .1659 cents, gives the fair estimated cost of all services for State traffic per ton-mile, .5543 cents, while in like manner the fair estimated cost per ton-mile of interstate traffic is .4976 cents (the sum of .3884 cents and .1092 cents), thus showing that the fair estimate of the cost of conducting the State traffic per ton-mile is 11.4 per cent. higher than that of conducting the interstate traffic.

On the other hand, the earnings per ton-mile of State traffic are 1.307 cents, while those per ton mile of interstate freight are only .759 cents, showing that the gross profit per ton-mile of State freight is .753 cents as against .261 cents gross profit per ton-mile on interstate freight; so that at the rates now in force the gross profit per ton-mile on State traffic is nearly three times as great as that on interstate freight.

It will also be observed that where the State traffic costs
36 per ton-mile .5543 cents and brings in earnings of 1.307 cents per ton-mile, the operating ratio on the State traffic is 42.40 per cent., while on the interstate traffic, with a cost per ton-mile of .4976 cents and earnings per ton-mile of .759 cents, the operating ratio is 65.57 per cent.

The estimated valuation submitted by the Louisville & Nashville as showing the actual present value of the property is the only valuation shown, although this evidently contains a number of items open to serious question. This valuation, which applies to all the property in Kentucky and includes equipment as well as the physical property, is estimated at $70,530,727.91. The present supply of capital seeking investment is such that bonds upon railway property like that of the defendant can readily be marketed upon the basis of from 4 to 4¼ per cent. annual return. Stock shares upon similar property can be readily marketed upon the basis of not to exceed 4 to 5 per cent. annual return, and an addition on the whole actual capital of about 1 to 1½ per cent. is usually ample allowance for accumulating surplus. The Louisville & Nashville stock

now sells currently at from 140 to 150, and is considered upon the market as fairly certain to yield 6 per cent. dividends, making the annual return upon the investment range from 4 2-7 to 4 per cent. That is to say, the investor who buys a share of Louisville & Nashville stock and pays for it $150 does so upon the expectation of deriving from it an annual dividend of $6, which is 4 per cent., upon his investment. He thus says that he considers, under all the circumstances, that 4 per cent. per annum is a fair rate of annual return upon the investment and one that he is willing to accept.

The annual addition to surplus in the Louisville & Nashville Railroad Company is somewhat less than the amount paid out in dividends, having been for the year ended June 30, 1905, about nine-tenths, and for prior years still less, and such devotion of income to surplus more than sufficiently insures the payment of dividends. It has, in fact, resulted in the accumulation of a surplus of undivided profits, beginning with June 30, 1894, and ending on June 30, 1905, which amounts to $14,899,106. This alone is more than sufficient to pay 6 per cent. dividends for four years. To obtain on this basis the average percentage by which to compute the annual allowance for the actual valuation, we take, on account of the funded debt, 2-3 of such capital at 4.25 per cent., which equals 2.83 per cent., on account of stock, 1-3 of such capital at 4.30 per cent.
37 which equals 1.43 per cent.; on account of accumulation and maintenance of surplus, an allowance of 1.30 per cent. is ample. These figures added together give a percentage of 5.56 per cent. and indicate that an allowance of 5.6 per cent. on account of charges upon capital is extremely liberal. This applied to the carrier's estimate of actual valuation of its Kentucky property, gives an annual charge on account of valuation, amounting to $4,450,488.75, including taxes which are stated to be $500,752.75.

To apportion this annual charge on account of valuation, first, as between the State and interstate passenger and freight business, and second, as between the State passenger and freight business, and do so with fair regard to the carrier's interests as well as those of the public, is a task of no little difficulty and one which we are not advised has been attempted heretofore in any similar case in any State, nor have we been assisted in this respect in any degree by the defendant carriers. We have before us simply the total actual valuation of the property in Kentucky as estimated by the carrier's consulting engineer. We have first had to determine the proper annual charge to be allowed for such valuation, and in doing so we have taken into account the market value of the carrier's stock and bonds and the maintenance of its surplus. Now, how shall this Commission, guided by no precedent, apportion this current annual charge of (in round figures) $4,450,500 and arrive at the proper portion of that charge to be laid against the State freight traffic of the defendant in Kentucky. Certainly neither gross earnings nor net earnings can be a satisfactory basis of apportionment of these charges for this purpose, particularly where the purpose of the apportionment is to determine the propriety of the rates from which these gross earnings and net earnings result. In this case the earnings result from the rates in question. This

annual charge for valuation is in a sense part of the carrier's cost, and to attempt to justify the apportionment of costs by the earnings resulting from rates, and then to justify the rates by the apportionment of costs based on the earnings resulting from the rates, would clearly be reasoning in a circle. Nor can any suitable basis for apportionment of this annual charge on account of valuation, be derived from transportation statistics relating to passengers and freight, for the obvious reason that there is no common transportation unit, except the train-mile or car-mile, and the use of the train-mile or car-mile would give no help in apportioning between State freight and interstate freight, because no trains are devoted solely to
38 either class of freight, nor is any considerable number of cars assigned exclusively to either class of freight.

Plainly, then, we have left only the operating expenses as a basis of apportionment. The operating expenses for all traffic in Kentucky are reported to be $10,127,126, the annual charge on account of valuation of $4,450,500 is 43.95 per cent. of the reported total cost of operation. The operating expenses chargeable against State freight, as made up from the figures furnished by the carrier are $1,235,023. Apply this factor of 43.95 per cent. to the estimated cost to the carrier of doing the State business gives $542,744 as the fair total charge to be made against the State traffic on account of actual valuation including taxes. Adding this sum $542,744 to the estimated operating expenses, $1,235,023, amounts to $1,777,767. This sum represents the operating expenses of the carrier on the State traffic in Kentucky in 1905, and a fair return to that carrier upon the use of its property in the conduct of that business for that year. This amount includes not only the fairly apportioned cost of operation and taxes, but also net earnings of 5.6 per cent. on the actual value of the property. It also includes, what have not been heretofore mentioned, a liberal allowance (more than 13 1-3 per cent. of reported operating expenses), out of which to make permanent improvements to the property, and a considerable sum amounting to $259,842.46 wrongfully charged against Kentucky in the statement of salaries paid to general officers and general office clerks. The salaries and wages paid to all general officers and general office clerks whose headquarters are at Louisville, despite the fact that their services are in large part on account of parts of the system, outside of Kentucky, were charged by the carrier wholly to Kentucky. We think these salaries and wages should be apportioned upon no higher basis than the average percentage shown for wages paid to other officers and other employés. The actual amount exacted by the Louisville & Nashville Railroad Company for the State freight service over its lines is $2,552,273.62. This exceeded the allowance above made, namely, $1,777,767.79, by $774,506.63.

The Commission does not of course, undertake to say that the computations, the results of which are hereinbefore set forth, are mathematically accurate, for it is universally conceded that any exact statement of the cost to a carrier for performing its freight service, as compared with its passenger service, or for performing a part of the freight service as compared with the remainder, can not be made.

The commission has merely done the best it could with the
39 figures and facts before it, but it has endeavored in all its computations to make the most liberal allowance for actual valuation. Yet, with all this, we have a result showing charges by this carrier for intrastate traffic within the State of Kentucky, which are more than $774,000 in excess of just and reasonable rates.

On account of the failure of the other defendants herein to furnish the data called for, the Commission has been forced to use that furnished by the Louisville & Nashville Railroad alone in making its analysis and, aside from the annual reports made by each of the defendants as to their earnings, very little information has been furnished by the other defendants that would be of any assistance to the Commission in making a similar analysis for each of them. The accounts of the railroads in Kentucky are not kept so as to show a separation of their intrastate and interstate earnings and operating expenses, and when called upon by the Commission to give this information they were forced to resort to the original way bills on file in their main offices and much delay was thereby occasioned. As an illustration of the enormous task which would be required to make a complete showing of all these earnings and operating expenses separately, it may be noted that for the Louisville & Nashville Railroad alone it would necessitate a separation and inspection of more than 250,000 way bills per month. As stated, the Commission was compelled to accept this data for four representative months, and the railroads were required to employ an extra force of clerks, in order to tabulate it, and when the information was furnished it was altogether unsatisfactory to the Commission as well as to the roads themselves. The Commission was very much surprised to see the very meagre showing made by each of the railroads regarding their intrastate traffic. It is not possible in this opinion to take up all these matters in detail. It is interesting, however, to note the several answers made to Question No. 28, "State Freight Earnings per mile of road in Kentucky."

Louisville, Henderson & St. Louis R. R.	$1,069 81
Illinois Central R. R.	1,435 62
Cincinnati, New Orleans & Texas Pacific Ry.	873 78
Southern Railway in Kentucky	1,728 67
Chesapeake & Ohio Railway	1,837 72
Louisville & Nashville R. R.	2,017 24
Lexington & Eastern Ry.	1,837 72
Louisville & Atlantic Ry.	1,886 11

40 When it is recalled that the gross receipts per mile for the year indicated, upon the Louisville & Nashville Railroad for all traffic in the State of Kentucky was $11,567 and that of the Illinois Central Railroad $10,932, the showing made by them as above stated as to their earnings per mile on intra-state freight is, to say the least, somewhat remarkable.

Other answers and statements might be taken up in detail and referred to, but, in view of the conclusions reached by the Commission, it is not deemed necessary to do so. Primarily all local rates

are made upon a mileage scale. Each road has its own scale of rates made upon a mileage basis. These rates are departed from where circumstances and conditions in the opinion of the carrier warrant such departure in lowering the rates shown by this scale. An examination of these various mileage scales discloses the fact that different maximum rates have been adopted by the several defendants. We find that the scale of rates used by the defendants the Cincinnati, New Orleans & Texas Pacific Railway, are, as a rule, the lowest maximum rates of any of the defendants. It is also found that the Louisville & Nashville Railroad on its Kentucky Central Division has departed from its regular mileage scale and, on account of competition with the Cincinnati, New Orleans & Texas Pacific, the latter company's rates are in effect upon the Kentucky Central Division. We also find that the mileage scale of rates made by the Southern Railway in Kentucky are approximately the same as those upon the Cincinnati, New Orleans & Texas Pacific, while those upon the Illinois Central are much higher than those of either of the aforesaid defendants. Considerable irregularity prevails in some of these scales. We, however, find that the scale of the Louisville & Nashville Railroad as shown in its local freight tariff designated "Table A," is, to say the least, more uniform, but we are of the opinion that the rates therein shown for all distances, under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M and N, to and from all points wholly within the State of Kentucky are extortionate, unjust and unreasonable. It is, therefore, Ordered, That said defendant, the Louisville & Nashville Railroad Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodi-
41 ties to and from points wholly within the State of Kentucky, rates in excess of the rates shown in the following table for the classes and distances therein stated, to-wit:

Distances.	In cents per hundred pounds.												Per bbl.	Per cwt.	Car loads per 100 lbs.		
	1	2	3	4	5	6	A	B	C	D	E	H	F	I	L	M	N
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	5	4	3	2
Over 10 miles and not over 15..	12	10	10	9	8	7	7	7	5	5	7	7	10	7	5	4	3
15 miles and not over 20..	16	14	12	10	10	9	9	9	6	6	9	9	12	9	6	5	4
20 miles and not over 25..	17	15	13	11	11	10	10	10	7	6	10	10	14	10	7	5	4
25 miles and not over 30..	20	17	15	13	12	11	11	11	8	6	11	11	16	11	8	5	5
30 miles and not over 35..	22	19	17	14	14	13	13	13	8	7	13	13	16	13	8	6	5
35 miles and not over 40..	24	20	18	16	15	14	14	14	9	7	14	14	18	14	9	6	5
40 miles and not over 45..	26	23	20	17	17	16	16	16	10	8	16	16	20	16	10	6	5
45 miles and not over 50..	28	24	21	19	18	17	17	17	11	8	17	17	22	17	11	7	5
50 miles and not over 55..	29	26	23	20	19	17	17	17	11	8	17	17	22	17	11	8	5
55 miles and not over 60..	31	26	23	21	20	18	18	18	12	8	18	18	24	18	12	9	6
60 miles and not over 65..	32	28	25	23	20	19	19	19	13	9	19	19	26	19	13	9	6
65 miles and not over 70..	34	29	26	23	21	20	20	20	13	9	20	20	26	19	13	10	6
70 miles and not over 75..	35	31	27	24	22	20	20	20	14	10	20	20	28	19	14	10	7
75 miles and not over 80..	37	32	28	25	23	21	21	21	14	11	21	21	28	19	14	11	7
80 miles and not over 85..	38	33	29	26	23	22	22	22	14	11	22	22	28	19	14	11	7
85 miles and not over 90..	40	34	30	26	24	23	23	23	14	11	23	23	28	19	14	11	8
90 miles and not over 95..	41	35	31	27	24	23	23	23	14	11	23	23	28	19	14	11	8
95 miles and not over 100.	41	35	32	28	24	23	23	23	15	11	23	23	30	19	15	11	8
100 miles and not over 110..	42	36	32	29	25	23	23	23	15	11	23	23	30	20	16	12	8
110 miles and not over 120..	44	38	33	29	26	24	24	24	16	12	24	24	32	20	17	12	8

120 miles and not over 130..	45	39	35	31	27	25	25	25	16	12	25	25	32	20	17	13	9
130 miles and not over 140..	47	40	35	32	28	26	26	26	17	13	26	26	34	20	18	13	9
140 miles and not over 150..	48	41	37	33	29	27	27	27	17	13	27	27	34	21	19	14	10
150 miles and not over 160..	50	43	38	34	30	28	28	28	17	14	28	28	34	21	20	14	10
160 miles and not over 170..	51	44	39	35	32	29	29	29	17	14	29	29	34	22	20	14	11
170 miles and not over 180..	53	45	40	36	32	29	29	29	18	14	29	29	36	22	21	15	11
180 miles and not over 190..	54	47	41	37	33	30	30	30	18	14	30	30	36	23	22	15	11
190 miles and not over 200..	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12
200 miles and not over 210..	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12
210 miles and not over 220..	59	50	43	39	35	32	32	32	20	15	32	32	40	23	24	17	13
220 miles and not over 230..	60	52	44	40	36	33	33	33	20	15	33	33	40	23	25	17	13
230 miles and not over 240..	62	53	44	41	37	34	34	34	20	16	34	34	40	23	26	17	14
240 miles and not over 250..	63	54	45	41	38	35	35	35	20	16	35	35	40	24	27	17	14
250 miles and not over 275..	65	56	46	42	38	35	35	35	21	17	35	35	42	24	29	18	14
275 miles and not over 300..	68	58	47	43	39	36	36	36	21	17	36	36	42	24	29	19	15
300 miles and not over 325..	70	59	47	44	40	37	37	37	22	17	37	37	44	24	30	20	16
325 miles and not over 350..	72	61	48	44	41	38	38	38	22	17	38	38	44	25	32	20	17
350 miles and not over 375..	74	62	49	45	41	38	38	38	23	18	38	38	46	25	33	21	17
375 miles and not over 400..	77	64	50	46	42	39	39	39	23	18	39	39	46	25	35	22	18
400 miles and not over 425..	78	65	50	47	43	40	40	40	24	19	40	40	48	26	35	23	19
425 miles and not over 450..	80	65	51	47	44	41	41	41	26	19	41	41	52	26	36	23	19

Provided, however, That where said defendant, the Louisville & Nashville Railroad Company has in effect a tariff, or tariffs of rates, upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in
42 said Maximum Table of Rates, and herein designated "maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," said defendant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs.

The Commission is further of the opinion that the Maximum Mileage Scale of Rates published in Nashville, Chattanooga & St. Louis Railway Company's Local Tariff Number 7, effective May 1, 1900, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, L, M and N, are extortionate, unjust and unreasonable in so far as same are in excess of the rates herein fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company." It is, therefore, Ordered, That the said defendant, the Nashville, Chattanooga & St. Louis Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky, rates in excess of the rates shown in said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," and for the classes and distances therein stated.

Provided, however, That where said defendant, the Nashville, Chattanooga & St. Louis Railway Company has in effect a tariff, or tariffs, of rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Maximum Table of Rates, and herein designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The commission is further of the opinion that the maximum mileage scale of rates published in the Illinois Central Railroad Company's Local Freight Tariff No. A-1045, effective December 2, 1905, for all distances therein shown under classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, K, L, M, N, and O, are extortionate, unjust and unreasonable in so far as same are in excess of the rates hereinafter fixed in table designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company." It is therefore, Ordered, That said
43 defendant, the Illinois Central Railroad Company be, and it is, hereby forbidden to charge, collect and receive for the transportation of commodities to and from points wholly within the State of Kentucky rates in excess of the rates shown in the following table for the classes and distances therein stated, to-wit:

Distances.	In cents per hundred pounds.												In cts. per bbl.	In cts. per 100 lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
For 10 miles and less.....	10	8	7	6	6	5	5	5	4	4	5	5	8	4	4	3	2	2
Over 10 miles and not over 15..	12	10	10	9	8	7	7	7	5	5	7	7	10	5	5	4	3	3
15 miles and not over 20..	16	14	12	10	10	9	9	9	6	6	9	9	12	6	6	5	4	4
20 miles and not over 25..	17	15	13	11	11	10	10	10	7	6	10	10	14	7	7	5	4	4
25 miles and not over 30..	20	17	15	13	12	11	11	11	8	6	11	11	16	8	8	5	5	5
30 miles and not over 35..	22	19	17	14	14	13	13	13	8	7	13	13	16	8	8	6	5	5
35 miles and not over 40..	24	20	18	16	15	14	14	14	9	7	14	14	18	9	9	6	5	5
40 miles and not over 45..	26	23	20	17	17	16	16	16	10	8	16	16	20	10	10	6	5	5
45 miles and not over 50..	28	24	21	19	18	17	17	17	11	8	17	17	22	11	11	7	5	5
50 miles and not over 55..	29	26	23	20	19	17	17	17	11	8	17	17	22	11	11	8	5	5
55 miles and not over 60..	31	26	23	21	20	18	18	18	12	8	18	18	24	12	12	9	6	6
60 miles and not over 65..	32	28	25	23	20	19	19	19	13	9	19	19	26	13	13	9	6	6
65 miles and not over 70..	34	29	26	23	21	20	20	20	13	9	20	20	26	13	13	10	6	6
70 miles and not over 75..	35	31	27	24	22	20	20	20	14	10	20	20	28	14	14	10	7	7
75 miles and not over 80..	37	32	28	25	23	21	21	21	14	11	21	21	28	14	14	11	7	7
80 miles and not over 85..	38	33	29	26	23	22	22	22	14	11	22	22	28	14	14	11	7	7
85 miles and not over 90..	40	34	30	26	24	23	23	23	14	11	23	23	28	14	14	11	8	8
90 miles and not over 95..	41	35	31	27	24	23	23	23	14	11	23	23	28	14	14	11	8	8
95 miles and not over 100..	41	35	32	28	24	23	23	23	15	11	23	23	30	15	15	11	8	8
100 miles and not over 110..	42	36	32	29	25	23	23	23	15	11	23	23	30	16	16	12	8	8

Distances.	In cents per hundred pounds.												In cts. per bbl.	In cts. per 100 lbs.				
	1	2	3	4	5	6	A	B	C	D	E	H	F	K	L	M	N	O
Over 110 miles and not over 120..	44	38	33	29	26	24	24	24	16	12	24	24	32	17	17	12	8	8
120 miles and not over 130..	45	39	35	31	27	25	25	25	16	12	25	25	32	17	17	13	9	9
130 miles and not over 140..	47	40	35	32	28	26	26	26	17	13	26	26	34	18	18	13	9	9
140 miles and not over 150..	48	41	37	33	29	27	27	27	17	13	27	27	34	19	19	14	10	10
150 miles and not over 160..	50	43	38	34	30	28	28	28	17	14	28	28	34	20	20	14	10	10
160 miles and not over 170..	51	44	39	35	32	29	29	29	17	14	29	29	34	20	20	14	11	11
170 miles and not over 180..	53	45	40	36	32	29	29	29	18	14	29	29	36	21	21	15	11	11
180 miles and not over 190..	54	47	41	37	33	30	30	30	18	14	30	30	36	22	22	15	11	11
190 miles and not over 200..	56	48	41	38	34	31	31	31	19	15	31	31	38	23	23	16	12	12
200 miles and not over 210..	57	49	42	38	35	32	32	32	19	15	32	32	38	23	23	16	12	12
210 miles and not over 220..	59	50	43	39	35	32	32	32	20	15	32	32	40	24	24	17	13	13
220 miles and not over 230..	60	52	44	40	36	33	33	33	20	15	33	33	40	25	25	17	13	13
230 miles and not over 240..	62	53	44	41	37	34	34	34	20	16	34	34	40	26	26	17	14	14
240 miles and not over 250..	63	54	45	41	38	35	35	35	20	16	35	35	40	27	27	17	14	14
250 miles and not over 275..	65	56	46	42	38	35	35	35	21	17	35	35	42	29	29	18	14	14
275 miles and not over 300..	68	58	47	43	39	36	36	36	21	17	36	36	42	29	29	19	15	15
300 miles and not over 325..	70	59	47	44	40	37	37	37	22	17	37	37	44	30	30	20	16	16

Provided, however, That where said defendant, the Illinois Central Railroad Company has in effect a tariff, or tariffs of rates, upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in
44 said Maximum Table of Rates, and herein designated "maximum rates, Kentucky Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company," said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs.

The Commission is further of the opinion that all rates now in effect upon the Cincinnati, New Orleans & Texas Pacific Railway and the Southern Railway in Kentucky, as shown by their respective tariffs and mileage scale of rates on file in this office, respectively, to-wit: Cincinnati, New Orleans & Texas Pacific Railway Company's Local Mileage Tariff Number 8, effective January 1, 1906, and Southern Railway Company in Kentucky's Local Tariff Number 4, effective February 27, 1905, where the same are in excess of the mileage scale of rates hereinbefore fixed for the defendant, the Louisville & Nashville Railroad Company and herein designated "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company," are hereby declared to be extortionate, unjust and unreasonable. It is, therefore, Ordered, That said Cincinnati, New Orleans & Texas Pacific Railway Company and said Southern Railway Company in Kentucky be, and they are, hereby forbidden to charge, collect or receive for the transportation of commodities, rates in excess of those herein permitted to be charged by said Louisville & Nashville Railroad Company as shown by said Standard Local Scale of Rates.

Provided, however, That where either of said defendants, the said Cincinnati, New Orleans & Texas Pacific Railway Company or said Southern Railway in Kentucky, now has in effect rates lower than those fixed by said standard scale, said defendants shall not charge, collect or receive rates in excess of said lower rates as now published by said defendants respectively.

In view of the fact that the defendant, the Chesapeake & Ohio Railway Company, uses what is known as the "Official Classification," which is entirely different from the Southern Classification now in use by nearly all of the railroads in the State of Kentucky, and not being able at this time to assimilate said classifications, or to make an accurate comparison thereof, the Commission does not feel warranted at this time in making a mileage scale of rates or a classification for the use of the said Chesapeake & Ohio Railway Company. It is, however, of the opinion, and it is now Ordered, That said Chesapeake & Ohio Railway Company be, and it is, hereby forbidden to charge, collect and receive for the transportation
45 of commodities, rates in excess of those herein permitted to be charged by the defendant, the Louisville & Nashville Railroad Company, as shown by said "Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad Company." Said Chesapeake & Ohio Railway Company may assimilate its classification with that of the Southern Freight Classification, and exceptions thereto, now in use

by said Louisville & Nashville Railroad Company upon the basis heretofore adopted and now in use by said Chesapeake & Ohio Railway Company for such assimilation as shown by its tariffs now on file in this office.

This Commission has not yet adopted a standard classification for any or all of the railroads in the State, and in the absence of such classification, and for the purpose of effectuating this order, it now hereby adopts the Southern Freight Classification now in effect with the current exceptions issued by the various railroads, defendants hereinbefore named, applicable to Kentucky traffic, and the Commission reserves the power to revoke, change or modify this order and to change or modify any or all of said rates, classifications and exceptions thereto, and reserves further the power to make and issue a classification of its own for the use of any or all of said defendants; and it appearing to the Commission from tariffs now on file in this office that many of the commodities assigned to the various classes stated in the Maximum Rates, Kentucky Railroad Commission's Standard Tariff Nos. 1 and 2, herein adopted, are transported by the respective railroads on commodity rates, or rates less than those fixed by said standard tariffs, it is now Ordered, That said commodity or such other rates as are lower than those fixed by said Railroad Commission's Standard Tariffs Numbers 1 and 2, shall remain in effect AS MAXIMUM RATES until otherwise ordered by this board.

All other questions herein are reserved for future determination, and the Commission will, from time to time, make and issue such orders upon all matters herein as may be deemed just and proper.

It is further Ordered, That each of the defendants be furnished with copies of this opinion and order, and copies of said Maximum Rates, Kentucky Railroad Commission's Standard Tariffs Nos. 1 and 2 attested by the Secretary of the Commission.

June 10, 1906.

C. C. McCHORD, *Chairman;*
A. T. SILER,
McD. FERGUSON,
Commissioners.

A copy.

Attest:

MOSES R. GLENN,
Secretary of the Railroad Commission.

46 The foregoing exhibit is endorsed in words and figures as follows, viz: Filed July 25, 1906, W. G. Chapman, Clerk.

On the same day, to-wit, on the 25th day of July, A. D., 1906, a subpœna in chancery was issued on the foregoing Bill of Complaint, which said Subpœna is in words and figures as follows, viz:

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

The President of the United States of America, to the Marshal of the Eastern Kentucky District, Greeting:

You are hereby commanded to summon Charles C. McChord, Adam T. Siler, and McDougal Ferguson, constituting the Railroad Commission of the State of Kentucky, to appear before our Circuit Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Frankfort, on the first Monday in September next, to answer a bill in equity, exhibited against them in our said Court, by Cincinnati, New Orleans & Texas Pacific Railway Company and this they shall in nowise omit, under the penalty of four hundred dollars; and have you then — there this writ.

In testimony whereof, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States of America, [SEAL.] hath caused the seal of our said Circuit Court to be hereunto affixed, at the Clerk's Office of said Court in Frank-
47 fort, this 25th day of July, A. D., 1906, and in the 131st year of our Independence.

Attest:

WALTER G. CHAPMAN, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in the Clerk's Office of said Court, on or before the first Monday in September, 1906; otherwise the said Bill may be taken *pro confesso.*

WALTER G. CHAPMAN, *Clerk.*

The Marshal's Return on the foregoing Subpœna is as follows, viz:

Received this Subpœna in Chancery at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to each of the within named defendants at the following times and places, viz.: to McDougal Ferguson, on July 26th, 1906, at Frankfort, Ky.; to Adam T. Siler, on July 27th, 1906, at Williamsburg, Ky.; to Charles C. McChord, on August 17th, 1906, at Frankfort, Ky.

Witness my hand this the 17th day of August, 1906.

S. G. SHARP,
U. S. Marshal,
By N. I. McDANIEL, *D. M.*

Clerk's Endorsement on the foregoing subpœna is as follows, to-wit:

Returned & filed Aug. 22, 1906, W. G. Chapman, Clerk.

48 On a day following, to-wit, on the 26th day of July, A. D., 1906, a restraining order was made and entered in said cause, which said order is in words and figures as follows, viz:

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY
vs.
CHARLES C. McCHORD ET AL.

The Complainant moved the Court to grant to it a preliminary writ of injunction in accordance with the prayer of the bill of complaint, and said motion is now fixed for hearing on the 24th day of September, 1906, at 11 o'clock, A. M., in the court room in the City of Frankfort, Kentucky; and it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing of said application for the writ of injunction, unless the said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted, and that the said Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force and effect their order of June 20, 1906, promulgated July 19 or July 20, 1906, reducing the railroad rates of the complainant on intrastate freight between points within the State of Kentucky or putting into force and effect the schedule of maximum rates prepared and promulgated thereunder so far as such rates relate to the railroad of the complainant; and also are restrained and enjoined, individually and jointly as constituting said Railroad Commission, from recommending or causing to be instituted any prosecution by indictment, or other legal proceed-
49 ing, against the complainant or any of its officers, agents or employés, to recover any fine or penalty imposed by Section 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever, for or on account of complainant's failure or refusal to put into force and effect the Railroad Commission's order aforesaid, or the rates fixed in the schedule of maximum rates prepared thereunder, until the hearing upon the said application for writ of injunction and the further order of the court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of this said motion if they so desire.

Certified copy of said Restraining Order having been placed in the hands of the United States Marshal for the Eastern District of Kentucky for service, the same was returned and filed in the Clerk's Office on August 22nd, 1906, with said Marshal's return thereon as follows:

Received this Restraining Order at Frankfort, Ky., on July 26th, 1906.

Executed the same by delivering a true copy thereof to the within named McDougal Ferguson, at Frankfort, Ky., on July 26th, and further by delivering a true copy thereof to the within named Adam T. Siler, at Williamsburg, Ky., on July 27th, 1906. Charles C. McChord not found within my District.

Witness my hand this the 27th day of July, 1906.

S. G. SHARP,
U. S. Marshal.
By N. I. McDANIEL, *D. M.*

50 Certified copy of said Restraining Order having been placed in the hands of the United States Marshal for the Western District of Kentucky for service, the same was returned and filed in the Clerk's Office on July 28th, 1906, with said Marshal's Return thereon, as follows:

Received this writ at Louisville, Ky., July 26th, 1906, and executed same by delivering a true copy thereof to Charles C. McChord at 8 o'clock P. M., July 26th, 1906, in Louisville, Ky. This July 26th; 1906.

G. W. LONG,
U. S. Marshal for the Western District of Ky.

On a day following, to-wit, on the 3rd day of September, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.
vs.
CHARLES C. MCCHORD ET AL.

Now come Charles C. McChord, Adam T. Siler and McDougal Ferguson, defendants herein, by their attorney, Bennett H. Young, and enter their appearance in the above styled cause.

On a day following, to-wit, on the 24th day of September, A. D. 1906, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

51 No. 545.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
vs.
CHARLES C. MCCHORD ET AL.

This cause came on to be heard on the motion for an injunction *pendente lite* and it is now ordered that the restraining order hereinbefore entered be continued as an interlocutory injunction until the final hearing of the cause or until the further order of the court herein, the defendants not objecting to this order on condition that complainant shall stipulate, and said complainant does now so stipulate as follows:

(1) All way-bills made out by it on and after October 1, 1906, on Kentucky intra-state shipments shall show on their face the date, point of origin, point of destination, consignor and consignee, the character of articles consigned for shipment, weight, rate, freight and total charges.

(2) Such way-bills shall be preserved until the final determination of the cause.

(3) There shall be given to each shipper where he prepays the freight, or to the consignee where he pays the freight, a bill of lading, receipt or expense bill showing the date, point of origin, destina-

tion, name of consignor and consignee, character of freight shipped, weight thereof, rate of freight and total amount of freight charges.

(4) The Complainant shall keep all Kentucky intra-state way-bills separate from interstate way-bills and on file in its general offices so separated, to the end that from such way-bills, bills of lading, receipts or expense bills it may be hereafter determined, if such should become necessary or expedient, what amount, if

52 any, was charged to each shipper in excess of a lawful rate.

This order, however, is not to prejudice the complainant's right to contest, as a matter of law, the claim of shippers to recover of it any such success. And time is given to defendants until November Rules to plead, answer or demur. This order is entered by consent of parties hereto. John W. Ray, Esq., an attorney of this bar, appeared on behalf of the Attorney General of the State and announced that the Attorney General did not consent thereto. The Court then announced that it would hear him in regard thereto, but he, not desiring to be heard, the order was entered subject to right of Attorney General, at any time, to move to set aside on due notice to parties hereto.

On a day following, to-wit, on the 5th day of November, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RY. CO.
vs.
CHAS. C. MCCHORD ET AL.

This day came the defendants, by their solicitors of record, and filed their answer to the bill of complaint herein.

The Answer of defendants, referred to in the foregoing order, is in words and figures as follows, to-wit:

53 Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, MCDOUGAL FERGUSON, and ADAM T. SILER, Railroad Commissioners of Kentucky, Defendants.

Answer.

To the Honorable Judges of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky:

I.

The defendants now and at all times hereinafter saving to themselves all and all manner of benefit of exception or otherwise that

can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as the defendants are advised it is material or necessary for them to make answer to, answering, say:

II.

For answer to the fourth paragraph of the bill, the defendants admit that Section 820-A of Carroll's Kentucky Statutes referred to reads as alleged in the bill, and is as follows:

54 "When complaint shall be made to the Railroad Commission, accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said Commonwealth shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same, and also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record-book of their office and signed by the Commission and a copy thereof mailed to any officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a
55 third and succeeding conviction, in any sun not less than two thousand dollars nor more than five thousand dollars."

III.

For answer to the fifth paragraph of the bill, the defendants say that it is true that J. Ed. Guenther and others made complaint before the Railroad Commission, and also filed an amended complaint

in which it was averred and charged that all local freight rates from and to all local points in the State of Kentucky, as fixed and charged by the defendant railroads, on all classes of freight, were excessive, discriminatory and extortionate; that the local rates of freight as fixed, maintained and charged by the defendants therein were exorbitant, excessive and extortionate; that many of them were extortionate, and all of them discriminatory in favor of some localities as against other localities, and that the rates charged and maintained by the defendant companies, including the complainant, were in open violation of law, against public policy, illegal and extortionate; that the local rates fixed and maintained and charged by the defendant railroads throughout the State of Kentucky were not uniform; that they did not treat each local community with fairness or equitably, but the rates were arbitrarily fixed and maintained so as to build up one community and discriminate against another, at the pleasure of the said railroads. The defendants state that the averments in the complaint filed were true, and that the rates were unreasonable, extortionate and discriminatory, as averred in the complaint.

IV.

For answer to the sixth paragraph of the bill, the defendants admit that the Norman Lumber Company and several others united in a petition to be made parties to the proceeding before the
56 Commission, and in that petition it was alleged that they were residents of the State of Kentucky and engaged in shipping lumber, logs, ties and all timber commodities from point to point in the State of Kentucky, over the roads owned, controlled and operated by the complainant and the other defendants in the State of Kentucky. It was further averred in the complaint that all local freight rates from and to all points in the State of Kentucky, on all the commodities, as fixed and charged by the complainant and other railroads, were excessive and extortionate; and that the freight classifications were discriminatory and extortionate; that the rates and classifications on lumber, logs, ties and all timber commodities, to and from all points in Kentucky, were especially extortionate, discriminatory and unreasonable. It was further averred in the petition that the rate on railroads or cross-ties from non-competitive points to all other points in the State of Kentucky were so fixed by the complainant, and the other defendants that it amounted to confiscation, and prevented the owner of such ties from getting them to any open market. It was further averred that the rate on cherry, walnut and cedar timber, lumber and logs to and from all points in Kentucky was fixed by the complainant and the other defendants at three cents per hundred pounds higher than the rate on all other classes of timber, logs and lumber, and that there was no sound or legal reason for such increased charge on cherry, walnut and cedar timber. It is true that the Commonwealth of Kentucky filed an intervening petition and was made a party to the proceedings, and in which pleading the averments contained in the previous complaints to which we have referred were substantially reiterated

and re-stated. The defendants here aver that the statements contained in these several petitions were true; that the rates that had been fixed and maintained by the complainant and the other railroads were unreasonable, and unjust, discriminatory and extortionate, as averred in the said pleadings.

V.

For answer to the eighth paragraph of the bill, the defendants deny that the only matter properly before the Commission
57 was the question of regulating the freight on lumber, crossties, etc., as averred in the seventh paragraph of the bill. The defendants deny the averment that there was no evidence before the Commission that the rates of the complainant were unjust, extortionate and unreasonably high. The defendants aver that the judgment of the Commission was based upon sufficient evidence; but if it had not been, as a matter of fact the judgment was correct, because the rates fixed by the complainant and the other railroads were unjust, extortionate and unreasonably high.

VI.

For answer to the ninth paragraph of the bill, the defendants deny that the order of the Commission on July 19, 1906, will so reduce the revenue to be derived by the complainant from the operation of its freight trains on its intrastate business that it will be, or is, confiscatory in its character, or deprives the complainant of its property without due process of law, or takes its property for public use without just compensation. The defendants aver that the rates of toll fixed by the Commission are just and proper, in view of the present intrastate traffic and the prospect of the increase of freight business which will come to the complainant. The defendants deny that for the year ending June 30, 1905, its total net earnings were only $235,485.79; that its average net earnings for the ten years ending June 30, 1905, were only $156,590.99; that the cost of reproducing the complainant's property in Kentucky, necessarily used by its operation as a railway common carrier, is of the value of $15,732,921.29; that the total gross earnings from operations in Kentucky for the fiscal year ending June 30, 1905, were only $4,324,098.50; that the necessary operating expenses, including taxes, were as much as $3,184,719.13. The defendants deny that the operating cost, including taxes, to earn one dollar of revenue was 76.33 per cent.; that the gross earnings for the said year
58 from intrastate business were only $638,479.22, or that the ratio of intrastate gross earnings to total gross earnings in Kentucky was only 15 per cent.; that the gross earnings from freight for the aforesaid year were only $3,147,201.19, or that the gross freight earnings from intrastate traffic were only $173,008.55, or that the ratio of intrastate gross freight earnings to total gross earnings was only 27.10 per cent. The defendants deny that the operating cost to earn one dollar of intrastate revenue is largely greater than the operating cost to earn one dollar of total revenue or of in-

terstate revenue. The defendants deny that the minimum excess cost of conducting intrastate traffic over interstate traffic is 10 per cent., or any other per cent. The defendants deny the averment that there was no reason for reducing the complainant's rates, or that there was no evidence or information before the Commission tending to show that the said rates were either unjust, unreasonable or extortionate. The defendants deny the repeated averment that the rates established by the complainant were reasonable and just. They deny that the income which will be derived from the operation of the complainant's roads will be so reduced by reason of the order of the Commission as to render the rates so fixed confiscatory, or that they will deprive the complainant of its property without due process of law, or be in violation of the Fourteenth Amendment to the Constitution of the United States, or any other provision of that instrument.

VII.

The defendants, for answer to the tenth paragraph of the bill, deny the averment that the Commission had no right or authority to make a tariff of rates which would be applicable to each road, in so far as such tariff was lower or equal to the rate charged by such road, or that the Commission had no right to forbid the complainant and the other roads from charging a rate equal to that described in the said tariff, on all of the classes embraced therein, or that the defendants had no right to forbid this complainant and the
59 other roads from charging a rate equal to that described in the said tariff, on all of the classes embraced therein, or that the defendants had had no right to forbid this complainant from advancing rates which it had in effect at the time the said defendants entered their order therein. It is true that while the complainant was charging rates of toll on certain classes and commodities that were not regarded as excessive by the Commission, yet the Commission being of the opinion that it was proper to continue and maintain such rates, in view of the fact it was passing upon the general question of freight rates, ordered that these rates should not be increased without further order of the Commission. The Commission was of the opinion that the rates thus maintained by the railroads were just, but that it would be unjust and extortionate to permit the railroads to increase them. The defendants deny that the order of the Commission is special, partial or unjustly discriminatory, or is violative of the Constitution of Kentucky, or that it is special legislation, or that it is a taking of private property for public use without just compensation, or that it is violative of the Constitution of the United States in depriving complainant of its property without due process of law, or that it is denying it the equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution, or any other provision of that instrument.

VIII.

For answer to the eleventh paragraph of the bill, the defendants deny that the act under which the defendants made their order is

violative of the Constitution of the State of Kentucky or of Section 27, 28, 109 and 135 thereof, or that it is violative of the Constitution of the United States, Sub-section 3, Section 8, of article 1 of that instrument; or that the act attempts to deal with interstate traffic; or that it is violative of the Constitution of the State of Kentucky, or of the Fourteenth Amendment to the Constitution of the United States or any other provision of that instrument; or that the act is in-
60 valid, or a violation of any Constitutional provision, because it does not attempt to deal with common carriers in the State, save railroads. Defendants deny that the complainant is by the act deprived of the protection of the law equal to that enjoyed by other common carriers, or that the act is violative of Section 17 of the Constitution of the State of Kentucky, or of Article VII of the Amendments to the Constitution of the United States, or that the act endeavors to impose fines which are excessive.

IX.

The defendants for answer to so much of the twelfth paragraph of the bill as they deem necessary to answer say that they deny that the railroads against which the order does not operate have in force and effect rates higher than those of the complainant, or higher than those prescribed in the order to be observed by the six railroads embraced in the order, or that the rates charged by the said roads against which the said order does not operate are charged under substantially similar circumstances and conditions to any of the roads named in the said order. They deny that the said order is partial, unjust or discriminatory, or beyond the power and authority of the Railroad Commission.

X.

Defendants deny that their said order and opinion was without authority of the law in that, or in any other respect, wherein it was ordered that where complainant has in effect a tariff or tariffs of rates upon commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said Commission's Maximum Table of Rates design-ed "Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Railroad Co.," complainant shall not charge, collect or receive rates in excess of that shown by said tariff or tariffs. Defendants aver that, under the circumstances, it was entirely proper for the Commission to order the commodity, or such other rates as
61 were lower than those fixed by said Railroad Commission's Standard Tariff No. 1, to remain in effect as maximum rates until otherwise ordered by the Commission; that complainant had established and maintained these rates as just and reasonable, and that they were no more than just and reasonable under the circumstances. In addition to its own judgment upon this proposition, the Commission was and is fortified by the complainant's judgment, evidenced by the fact that complainant made and fixed said rates as just and reasonable; that complainant has not increased these commodities or lower rates or attempted to do so, nor has it made any application to the commission to have the order changed with

reference thereto. Defendants deny that said commodity or other rates, or any of them, are lower than similar rates in force upon other roads, competitors of complainant in business. Defendants deny that that portion of their said order as undertakes to prohibit complainant from increasing its existing lower commodity rates from what they are to said Commission's maximum rates on the classes to which such commodities belong is either null or void.

XI.

Defendants say that complainants and all other railroad carriers have heretofore adopted a plan for making rates. In accordance with this plan or basis, the many thousands of articles which they are required to transport, and for the transportation of which rates must be made, are classed or grouped in such a way as to bring them together into one or the other of said classes or groups, in order that each class or group may be subjected to the same charge for carriage. A rate is then fixed for each class or group, this being done to facilitate the making of rates, and is but one of the elements and a part of the plan or basis for making same. As shown in complainant's local freight tariffs and in "Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Railroad Co.," complainant had, theretofore, adopted certain
62 classifications or groups, to-wit: numbers 1, 2, 3, 4, 5, 6, and letters A, B, C, D, E, H, F, I, L, M, and N. Under these classifications or groups, about three thousand five hundred (3,500) commodities are distributed, and the rate upon each class or group is then fixed as show- in said tariffs, thereby fixing the rate for the transportation of each commodity assigned to the several classes or groups. Defendants did not change complainant's plan or basis for making such rates, but, upon the contrary, adopted and approved the same as the most convenient form and method of making and fixing said rates, and the plan or basis thus adopted is nothing more nor less than making and fixing the rate. Defendants deny that their power is limited to a case where, upon complaint, or their own motion, after notice and investigation, they find an existing rate is extortionate, they may, in lieu of the particular rate held by them to be extortionate, make, fix and name a rate which they shall determine to be a just and reasonable one for like services thereafter rendered.

XII.

Wherefore, these defendants having fully answered, confessed, traversed and avoided or denied all the matters of said bill of complaint material to be answered, according to their best knowledge and belief, humbly pray this honorable court to enter its decree that the defendants be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as to this honorable court may seem meet, and in accordance with equity.

BENNETT H. YOUNG,
ROB'T H. WINN,
T. H. PAYNTER,
Attorneys for Defendants.

The foregoing answer is endorsed in words and figures as follows, to-wit: Filed at Rules Nov. 5, 1906, W. G. Chapman, Clerk.

63 On a day following, to-wit, on the 3rd day of December, A. D., 1906, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
vs.
CHARLES C. MCCHORD ET AL.

This day came the complainant, by its attorneys of record, and filed its replication herein.

The Replication of Complainant to the Answer of Defendants, referred to in the foregoing order, is in words and figures as follows, viz:

64 Circuit Court of the United States for the Sixth Circuit and the Eastern District of Kentucky.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, MCDOUGAL FERGUSON, and ADAM T. SILER, Railroad Commissioners of Kentucky, Defendants.

Replication of Complainant to Answer of Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky:

This replicant, saving and reserving to itself all and any manner of advantage or exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is true; all of which matters and things
65 this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly — as in and by its said bill it has already prayed.

JOHN GALVIN,
MAURICE L. GALVIN,
Solicitors for Plaintiffs.

The foregoing replication is endorsed in words and figures as follows, viz:

Filed at Rules, December 3rd, 1906, W. G. Chapman, Clerk.

66 On a day following, to-wit, on the 27th day of February, A. D., 1907, an order was made and entered in said cause, which order is in words and figures as follows, viz:

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
vs.
CHARLES C. McCHORD ET AL.

Now upon this day came the complainant, by John Galvin, its attorney, and the defendants, by Bennett H. Young and Thomas H. Paynter, their attorneys, and thereupon it is now ordered by the Court as follows:

1. Samuel H. Stone, Esq., is hereby appointed Special Commissioner to take such evidence in this cause as may be offered by either of the parties hereto, and to make report thereon to the court; and he will take such evidence as may be offered by either of the parties hereto, and report his findings of fact thereon to the court at the earliest reasonable time practicable, together with the evidence in the cause.

2. In taking such evidence the Commission is authorized to employ a competent and reliable stenographer, or stenographers, whose compensation shall be fixed by him, to take down the testimony and reduce the same to writing. And said Commissioner shall have power to appoint such place or places, for the taking of the evidence as may be convenient to the parties and witnesses. Due notice whereof shall be given to counsel for complainant and defendants.

3. He shall cause such evidence to be transcribed and printed under his supervision, furnishing to the complainant and the
67 defendants copies of the same. The expense of printing shall be taxed as costs and abide the result of this action. He shall fix a time in which the complainant shall take its evidence in chief, and the time in which the defendants shall take their evidence in response, and the time in which the complainant shall take its evidence in rebuttal, but shall have power to extend the time fixed by him for the taking of evidence by either party for good cause shown.

4. After the evidence offered by the parties shall have been taken the Commissioner shall make a full report to the Court of his findings upon the facts, and shall cause the same to be printed and copies thereof delivered to counsel for complainant and defendants.

He shall ascertain and find from the evidence introduced the following facts and report them to the court:

(*a*) The original cost of construction of the railroad and properties used by the complainant in the State of Kentucky in the conduct of its business as a common carrier.

(*b*) The amount expended thereon in permanent improvements.

(*c*) The amount, par, and market value of its bonds and stock as of March 1, 1907.

(*d*) The probable present cost of reconstruction and reproduction of the railroad and properties of the complainant, used in its business as a common carrier in the State of Kentucky in the condition in which they now are.

(*e*) The present value, as of March 1, 1907, of the rolling stock and equipment used by complainant in its business as a common carrier in the State of Kentucky.

68 (*f*) The total value of all the properties operated by the complainant in the State of Kentucky, and the value of all such properties devoted to the conduct of intrastate traffic, and the value thereof devoted to the conduct of interstate traffic, respectively, during the year ending June 30, 1905, and the year ending June 30, 1906, and as of March 1, 1907.

(*g*) The gross earnings, per annum, from the operation of complainant's railroads in Kentucky during the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, inclusive; showing, as nearly as practicable, what part of said earnings is from interstate commerce, and what part from intrastate commerce, stating the amounts derived from intrastate and interstate freight traffic separately from the amounts de rived from other traffic.

(*h*) The operating expenses and taxes expended by complainant in Kentucky for the year ending June 30, 1905, the year ending June 30, 1906, and from July 1, 1906 to March 1, 1907, inclusive; showing, as nearly as practicable, what part of said operating expenses and taxes was expended in the conduct of its interstate business, and what part of same was expended in the conduct of its intrastate business.

(*i*) The earnings which would have accrued to complainant for the year ending June 30, 1905, for the year ending June 30, 1906, and from July 1, 1906, to March 1, 1907, if the rates promulgated by the defendants by their order of June 20, 1906, had been in effect during said periods.

5. Said Commissioner shall report such other facts as may be developed in the evidence which are pertinent to the issues of this cause, and at the request of either party shall make a special finding upon any fact deemed material by such party to any issue

69 herein.

6. The Clerk of this Court will furnish the said Special Commissioner with a certified copy of this order and, without further order, turn over to him, taking his receipt therefor, all pleadings and court papers pertaining to this cause.

On a day following, to-wit, on the 11th day of March, A. D., 1907, an order was made and entered in said cause, which order is in words and figures as follows, viz:

C., N. O. & T. P. Railway Co.
vs.
Charles C. McChord et al.

It is ordered that this cause be, and it is hereby, continued until the next regular September Term of the Court.

On a day following, to-wit, on the 2nd day of August, A. D., 1907, an order was made and entered in the case of the Louisville & Nash-

ville Railroad Company *vs.* Charles C. McChord *et al.*, which said order applies to this case, and is in words and figures as follows, viz:

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. MCCHORD ET AL.

70 This day came Samuel H. Stone, Special Commissioner appointed by the Court to take proof in the several cases, viz: Southern Railway in Kentucky *vs.* Charles C. McChord, *et al.*, Cincinnati, New Orleans & Texas Pacific Railway Co. *vs.* Charles C. McChord, *et al.*, Illinois Central Railroad Company *vs.* Charles C. McChord, *et al.*, and Louisville & Nashville Railroad Company *vs.* Charles C. McChord, *et al.*, and all parties to said actions, by counsel, appearing before the Court, and it further appearing to the Court that it is necessary that the parties hereto shall make a deposit for the purpose of paying the costs of taking and writing the proof, printing, publishing and all other expenses connected therewith.

It is hereby ordered that all the plaintiffs herein shall pay, together, to Samuel H. Stone, Commissioner, the sum of $1,000. and that the Commonwealth of Kentucky shall pay to Samuel H. Stone, Commissioner, the sum of $1,000.00 said amount to be used in defraying expenses connected with the taking and writing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the court, and all questions as to the taxation of costs are reserved for future orders of the court.

On a day following, to-wit, on the 2nd day of December, A. D., 1907, an order was made and entered in the case of Louisville & Nashville Railroad Co., *et al.*, *vs.* Charles C. McChord, *et al.*, which said order applies to this case, and is in words and figures as follows, viz:

71 LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.
vs.
CHARLES C. MCCHORD ET AL.

This day came Samuel H. Stone, Special Commissioner appointed by the Court to take proof in the several cases, viz: Southern Railway Company in Kentucky *vs.* Charles C. McChord, *et al.*; Cincinnati, New Orleans & Texas Pacific Railway Company *vs.* Charles C. McChord *et al.*; Illinois Central Railroad Company *vs.* Charles C. McChord *et al.*; and Louisville & Nashville Railroad Company *vs.* Charles C. McChord *et al.*, and all parties to said actions, by counsel, appearing before the Court, and it further appearing to the court that it is necessary that the parties hereto shall make a further deposit for the purpose of paying the costs of taking and writing the proof, printing, publishing and all other expenses connected therewith,

It is hereby *ordered*, That all the plaintiffs herein shall pay, together, to Samuel H. Stone, Special Commissioner as aforesaid, the

sum of One Thousand ($1,000) Dollars, and that the Commonwealth of Kentucky shall pay to said Samuel H. Stone, Commissioner, the sum of One Thousand ($1,000) Dollars, said amount to be used in defraying expenses connected with the taking and writing out of the proof herein, printing, publishing the same, and any other wise, to be accounted for to the Court; and all questions as to the taxation of costs are reserved for future orders of the court.

On a day following, to-wit, on the 9th day of January, A. D., 1908, an order was made and entered in said cause, which said order
72 is in words and figures as follows, viz:

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
vs.
CHARLES C. McCHORD ET AL.

This day came the defendants, A. T. Siler and McD. Ferguson, and also came the Complainant, and it appearing from the report of Samuel H. Stone, Commissioner herein, that the defendant, C. C. McChord, had resigned his place as a member of the Railroad Commission of Kentucky, that one W. P. Walton was appointed and served as a member of the Commission until December 10, 1907, when his successor in office, Lew P. Tarlton who had been duly elected as a member of said Railroad Commission at the regular election held on November 5, 1907, duly qualified as such Commissioner; and it also appearing that the defendants, A. T. Siler and McD. Ferguson, had each been re-elected on November 5, 1907, to succeed themselves as members of said Railroad Commission; and upon these facts being suggested it was insisted that this action had abated.

And came the Complainant and moved the Court for leave to file a supplemental bill herein, bringing the said Lew P. Tarlton before the Court and asking a process against him. And the Court being advised, it is now ordered, adjudged and decreed, that the motion of the complainant to file said supplemental bill be sustained and that this action now proceed against the said A. T. Siler, McD. Ferguson and Lew P. Tarlton as members of the Railroad Commission of the State of Kentucky and against the said Railroad Commission; that process issue against the said Lew P. Tarlton; that the temporary
73 injunction heretofore granted herein be and it is so extended as to embrace the said Lew P. Tarlton and to bind and affect him and the other defendants during their new term of office as during their old term of office; subject to the same terms and conditions of the injunction heretofore granted.

Then came Llewellyn P. Tarlton in *propria persona* and entered his appearance hereto, and time is given the defendants until the March Rules 1908, to plead, demur or answer.

Supplemental Bill, referred to in the foregoing order, is in words and figures as follows, viz:

In the Circuit Court of the United States, for the Eastern District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
C. C. McCHORD, McD. FERGUSON and A. T. SILER, Defendants.

Supplemental Bill.

Now comes complainant and by way of supplemental bill herein represents and shows to the Court that the defendant C. C. McChord resigned his place as a member of the Railroad Commission of Kentucky on or about the — day of November, 1907, and that thereupon one W. T. Walton was appointed by the Governor of Kentucky as successor to said C. C. McChord and said Walton qualified as a member of said commission and served thereon until the 10th day of December, 1907, when one Lew P. Tarlton, who had theretofore, to-wit, on the 5th day of November, 1907, been
74 duly elected as a member of the said Railroad Commission at the regular election held on the said 5th day of November, 1907, for the purpose, duly qualified as a member of such commission. Your complainant further represents that on the said election held on the said 5th day of November, 1907, the defendants, A. T. Siler and McD. Ferguson were each duly re-elected to succeed themselves as members of said Railroad Commission and thereafter to-wit, on or about the 10th day of December, 1907, duly qualified as members of said Railroad Commission under said election, and are now acting under said new term. And all of said members of said Commission threaten to & unless restrained enforce the order complained of herein.

The complainant therefore prays that this cause now proceed against the said A. T. Siler, McD. Ferguson and Lew P. Tarlton as members of the Railroad Commission of the State of Kentucky, and against the said Railroad Commission; that process issue against the said Lew P. Tarlton and that he be brought into court as a defendant herein; that the temporary injunction heretofore granted herein be so extended as to embrace the said Lew P. Tarlton, and to bind and affect the other defendants during their new term of office as during their old term of office, and that the interlocutory injunction heretofore issued herein shall apply to and bind any successor, or successors of any of said three persons now members of said Railroad Commission, and prays for all relief heretofore prayed for in its original bill herein.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.,
By GALVIN & GALVIN, *Its Attorneys.*

75 The foregoing Supplemental Bill is endorsed in words and figures as follows, viz: Filed Jan. 9, 1908, W. G. Chapman,

On a day following, to-wit, on the 2nd day of March, A. D., 1908, an order was made and entered in said cause, at Rules, which order is in words and figures as follows, viz:

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
vs.
CHARLES C. MCCHORD ET AL.

This day came the defendants, Charles C. McChord, A. T. Siler, McDougal Ferguson and L. P. Tarlton, by their attorneys of record, and filed their joint and several plea to the bill of complaint and supplemental bill of complaint herein.

The joint and several plea of defendants, referred to in the foregoing order, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort. In Equity.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

76 The joint and several plea of Charles C. McChord, A. T. Siler, McDougal Ferguson, and L. P. Tarleton, to the bill of complaint, and to the supplemental bill of complaint of the Cincinnati, New Orleans & Texas Pacific Railway Company, the above-named complainant.

Now come the defendants, A. T. Siler, McDougal Ferguson, C. C. McChord, and L. P. Tarlton, and for plea to the supplemental bill, files herein at the February, A. D., 1908, rules and for plea to the original bill herein because of the hereinafter named events which have transpired since the filing of the answer herein, and say:

That in the latter part of November, A. D., 1907, the defendant, C. C. McChord, resigned his office as Railroad Commissioner of Kentucky, which resignation was duly accepted; and that he then and thereupon and has ever since ceased to hold said office or to exercise any of the duties thereof.

That on December 10th, A. D. 1907, the terms of office of the defendants, A. T. Siler and McDougal Ferguson, by the Constitutional and statutory laws under which their said offices were created and the terms thereof fixed, expires; and that their commissions of office and all their rights, privileges and duties, which they held and exercised under said commissions and as such officials and railroad commissioners holding under the elections set up in the original bills herein, then ceased and determined; that the terms of office which the last named two defendants now hold under, and the commissions which they now hold as railroad commissioners, and under which they now exercise the functions of said office, are

terms of office beginning on December 10th, A. D. 1907, and
77 commissions for said terms awarded them by reason of the fact that at the regular Kentucky State election, held in November, A. D., 1907, they were duly elected railroad commissioners, the said Ferguson for the first district of Kentucky, and the said Siler for the third district of Kentucky, for the term of four years from and after December 10th, A. D. 1908; that they thereupon, took the oath of their office, entered upon the discharge of the duties thereof, and are now holding and exercising same by virtue of, and solely by virtue of and under the said election of November, 1907, and their commissions thereupon awarded them.

That the Railroad Commission of Kentucky, as composed and constituted at the time of the institution of this action, has, by virtue of said resignation of said McChord, and the said expiration of the terms of office of said Siler and said Ferguson, ceased to exist; that this action was and is an action to control, restrain, direct and order, by the compulsory processes of this Honorable Court, the actions of said members of said commission, and that the relief sought by the complainant herein is against and by reason and virtue of an act or acts of the said Siler, McChord, and Ferguson as Railroad Commissioners of Kentucky, done by them on or about July 19th, A. D. 1906, and long before the said resignation of the said McChord, and the said expiration of the terms of office and official commissions of the said Siler and the said Ferguson as such railroad commissioners; that the duties, acts, laws, regulations, and facts, out of which this litigation arises, are official duties, acts, laws, regulations, and facts, and are and were incident to and resultant from, and solely incident to and resultant from acts done by,
and the fact that the said three defendants constituted and
78 were, the railroad commissioners of Kentucky on said July 19th, A. D. 1906, under terms of office and commissions which have since terminated by resignation and by law, as aforesaid.

That the defendant, L. P. Tarlton, was, by a majority of the duly qualified and voting electors, who voted at the regular 1907 election in and for the State of Kentucky, and the second Railroad Commission District thereof, at said election duly chosen as Railroad Commissioner of Kentucky for said second district; that he thereupon took the oath of his said office, entered upon the discharge of the duties thereof, and is still so acting; that said office is the same office which was held by the defendant C. C. McChord at the time of the institution of this action, and up and until his aforesaid resignation; that the said Tarlton had and took no part in the acts complained of in the original bill herein nor has he ever threatened or endeavored to issue any of the rate orders, or to set on foot any of the prosecutions, or to do any of the things, or to participate in the doing thereof, complained of and sought to be enjoined herein; that neither the said Siler, nor the said Ferguson, nor the said McChord, nor the said Tarlton has ever consented, nor does either or any of them now consent that the said Tarlton may be substituted as, or made a party defendant herein.

That by virtue and by reason of the foregoing set out facts, this

action has abated, and now stands abated as to each and all of the defendants herein named, and that same cannot be maintained longer against them or either or any of them.

All of which matters and things these defendants aver to be true, and they plead the said abatement to the bill and supplemental bill, and to each of them, upon which abatement and the said
79 facts, matters and things in support thereof, they pray the judgment of this Honorable Court, and as to whether this cause may further proceed; and they pray to be dismissed hence with their costs.

BENNETT H. YOUNG,
THOS. H. PAYNTER,
CHAS. C. McCHORD,
ROBT. H. WINN,
Counsel for Defendants.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

ROBT. H. WINN,
Of Counsel for Defendants.

STATE OF KENTUCKY,
County of Franklin:

A. T. Siler, being duly sworn, deposes and says that he is one of the above-named defendants; that the foregoing plea is true in point of fact, and is not interposed for delay.

A. T. SILER.

Subscribed and sworn to before me this 11" day of February, A. D., 1908. My notarial commission will expire 24" Jany. 1910. Given under my hand and seal of office.

[SEAL.] CHAS. G. MUTZENBERG,
Notary Public, Franklin County, Ky.

The foregoing plea is endorsed in words and figures as follows, viz: Filed at Rules, Mar. 2, 1908, W. G. Chapman, Clerk.

80 On a day following, to-wit, on the 9th day of March, A. D., 1908, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.
vs.
CHARLES C. McCHORD ET AL.

This day came and now comes the Complainant, the Cincinnati, New Orleans & Texas Pacific Railway Company and sets down for argument the plea in abatement of the defendants, filed herein as of February 1908 Rule Day.

The Complainants, upon notice to defendants, having set down the plea of defendants, filed at March Rules 1908, for argument, and

said plea coming on for argument and having been argued by counsel for complainant and defendants, the same was overruled by the court, to which ruling the defendants excepted and they have ten days in which to answer.

On a day following, to-wit, on the 18th day of March, A. D., 1908, defendants filed their answer to supplemental bill, which said answer is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

81 THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainants,
vs.
CHARLES C. MCCHORD ET AL., Defendants.

Answer to Supplemental Bill.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The defendants, Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, respectively, now and at all times saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the errors, uncertainties and imperfections in complainant's supplemental bill contained, for answer thereto, or so much thereof as they are advised it is material or necessary for them to make answer to, jointly and severally answering, say:

Defendants admit the resignation of Charles C. McChord, the appointment of W. P. Walton, the election of defendants Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, and that each of them was duly qualified and that said defendant Siler was selected as Chairman of the Commission, all in the manner and on the dates set forth in said supplemental bill.

Further answering, defendants adopt, reiterate and affirm each and all of the statements and allegations set forth in the original answer herein as particularly as if the same were again here repeated, reiterated and set forth in full.

Wherefore, defendants pray as in their original answer and that they have such further and other relief in the premises as to this honorable court may seem mete and in accordance with equity.

82

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing answer is endorsed in words and figures as follows, viz: Filed Mar- 18, 1908, Chas. N. Wiard, Clerk.

On a day following, to-wit, on the 6th day of April, A. D., 1908, an order was made and entered in said cause, at Rules, which said order is in words and figures as follows, viz:

THE C., N. O. & T. P. RY. CO.
vs.
CHAS. C. MCCHORD ET AL.

This day came the complainant, by Jno. Galvin & M. L. Galvin, its solicitors, and filed its replication to the answer to the supplemental bill herein.

The replication of complainant to answer of defendants, referred to in the foregoing order, is in words and figures as follows, viz:

Circuit Court of the United States for the Sixth Circuit and the Eastern District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO., Complainant,
vs.
CHAS. C. MCCHORD ET AL., Defendants.

83 *Replication of Complainant to Answer of Defendants to Supplemental Bill.*

To the Honorable Judges of the Circuit Court of the United States for the Sixth Circuit and the Eastern District of Kentucky:

This replicant, saving and reserving to itself all and any manner of advantage or exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendants to the supplemental bill of the complainant, for replication thereunto, sayeth that it does and will ever maintain and prove its bill and supplemental bill to be true, certain, and sufficient in the law to be answered unto by said defendants and that the answer of said defendants to said supplemental bill is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly, as in and by its said bill and supplemental bill it has already prayed.

JOHN GALVIN,
MAURICE L. GALVIN,
Solicitors for Complainant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed at Rules, Apr. 6, 1908, Chas. N. Wiard, Clerk.

84 On the 10th day of July A. D. 1908, pursuant to an order of court, Complainant filed its Amended Bill in said cause, which Amended Bill is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Amended Bill.

The Complainant, Cincinnati, New Orleans & Texas Pacific Railway Company, by leave of court, now amends paragraph 12 of its original bill herein by adding thereto the following additional allegations, to-wit:

The complainant further states that said Commission, as its order promulgated July 20, 1906, and herein complained of shows on its face, made and applied its said schedule of maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 1," to the complainant and to only three other of the railroad companies operating lines in Kentucky; viz., the Louisville & Nashville Railroad Company, the Southern Railway Company in Kentucky and the Nashville, Chattanooga & St. Louis Railway; and made and applied its said schedule of Maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 2," to the Illinois Central Railroad Company alone.

Complainant states that said Commission by its said order did not make or apply, nor has it by any other order before or since, made or applied either of its said Standard Tariffs Nos. 1 and 2, or
85 any other schedule of maximum freight rates to the following railroad companies, which were then, have ever since been and are now within the jurisdiction of the State of Kentucky, and were then, have been ever since and are now engaged in the same business in said State as the complainant; that is to say, as common carriers of intra-state freight and passengers, with the following owned and operated mileage of railroad in said state, to-wit: the Chesapeake & Ohio Railway Company, 424.87 miles; the Louisville, Henderson & St. Louis Company, 165.20 miles; the Louisville & Atlantic Railroad Company, 101.10 miles; the Lexington & Eastern Railway Company, 92.54 miles; Mobile & Ohio Railroad Company, 39.69 miles; and all other railroad companies, of which there were many, owning and operating then, ever since and now, a railway in said state, with shorter mileage—all of which companies were made defendants to the complaints in the proceeding before said Commission, which culminated in the making of said order promulgated July 20, 1906.

The complainant states that while said Commission stated in its said order it made no mileage scale of rates or classification for the

use of the Chesapeake & Ohio Railway Company, it is true said Commission ordered that said Company should not collect and receive for the transportation of commodities rates in excess of those permitted to be charged by this complainant, as shown in said Commission's said Standard Tariff No. 1, but said Commission then and ever since has refrained from mailing to any officer, agent or employé of the Chesapeake & Ohio Railway Company a copy of its said order, or from putting or attempting to put the said order as to that company into force and effect, as prescribed in the McChord Act, or otherwise, and said order as to the Chesapeake & Ohio Railway Company has never been completed or made effective by said Commission, nor has it been observed by that company.

86 The complainant state that said Commission by its said order arbitrarily and without authority of law undertook to classify complainant with said three other companies and to prescribe a schedule of maximum freight rates for observance and to be observed by complainant, while neither it nor the Legislature of said state has ever prescribed any schedule whatever of maximum freight rates for or to be observed by said other above mentioned railroad companies, or either of them, then and now owning and operating their lines of railroad in said state, although they were then, have been ever since and are now engaged in the same business in which complainant was then and now engaged, to-wit: the carrying of intra-state freight on their lines within the State of Kentucky; and said Commission thus permitted said other railroad companies to operate their said lines of railroad and conduct their said business in said state, without any schedule of maximum rates having been prescribed for them, and to charge, collect and receive higher rates than those prescribed as the maximum rates for complainant on the same classes of intra-state freight and commodities, for the same distances, or such freight rates as such other railroad companies might or may deem reasonable, over their lines in Kentucky.

Complainant states that said arbitrary and unlawful classification of said railroad companies and prescribing of maximum intra-state freight rates for complainant and the few other railroad companies above named, and not for all railroad companies doing the same kind of business in Kentucky, was and is a positive, direct and unfair discrimination against complainant in favor of such other companies, and amounts to a denial by the State of Kentucky and said Commission (which is one of the instrumentalities provided

87 by said State, under its Constitution and laws clothed with the powers of said state, and acting for and in its behalf) to complainant of the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

And the Complainant further amends the 10th paragraph of its bill and file herewith as part hereof a table showing the maximum rates, Kentucky Railroad Commission's Standard Tariff No. 1, and the schedule of freight rates of complainant at that time existing, and which was to be displaced by said maximum rates, Kentucky

Railroad Commission's Standard Tariff No. 1. Complainant also files herewith a table showing its commodity tariff, and which was displaced by said Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1. And complainant states that many of its rates existing at the time the order of the Commission was made were the same as the rates prescribed by the Commission; and many of them were lower than such rates; and complainant says that the said Commission had no power to make any order in reference to any of its rates which were the same as those fixed in the Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, nor any that were lower than such standard tariff.

The complainant amends Paragraph 13 of its bill of complaint and states that the statute of the State of Kentucky under which the Commission acted and which is therein referred to and described is violative of the Fourteenth Amendment of the Constitution of the United States, particularly Section 1 thereof; and complainant pleads and relies upon such amendment and asks the advantage thereof.

Wherefore complainant prays as in its original bill and for all other relief to which it in equity may appear to be entitled.

88 CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By JOHN GALVIN,
General Attorney for Kentucky.

Exhibit, referred to in the foregoing amended bill, is in words and figures as follows, viz:

Comparative Statement of Freight Rates in Kentucky.

A=Rates in Effect on C., N. O. & T. P.
B=Rates Prescribed by Railroad Commission.
C=Amount of Reductions Prescribed by Railroad Commission.
D=Differences where Rates of C., N. O. & T. P. Ry. are Lower than Ky. Commissioners' Scale.

Distances.		Cents per 100 lbs.												Cents per bbl.		Cents per 100 lbs.	
		1	2	3	4	5	6	A	B	C	D	E	H	F	L	M	K
10 miles and under	A	10	9	8	7	7	6	6	6	5	5	6	6	10	3	4	3
	B	10	8	7	6	6	5	5	5	4	4	5	5	8	4	3	2
	C	..	1	1	1	1	1	1	1	1	1	1	1	2	..	1	1
	D	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..	..
15 miles and over 10	A	14	12	11	9	8	7	7	9	7	7	8	9	14	4	4.5	4
	B	12	10	10	9	8	7	7	7	5	5	7	7	10	5	4	3
	C	2	2	1	..	..	..	..	2	2	2	1	2	4	..	0.5	1
	D	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..	..
20 miles and over 15	A	14	12	11	9	8	7	7	9	7	7	8	9	14	4	4.5	4
	B	16	14	12	10	10	9	9	9	6	6	9	9	11	6	5	4
	C	..	..	..	..	..	..	..	..	1	1	..	..	3	..	..	..
	D	2	2	1	1	2	2	2	..	..	..	1	..	..	2	0.5	..
25 miles and over 20	A	21	19	16	14	11	10	10	13	10	8	11	12	16	5	5	5
	B	17	15	13	11	11	10	10	10	7	6	10	10	14	7	5	4
	C	4	4	3	3	..	..	..	3	3	2	1	2	2	..	..	1
	D	..	..	..	..	..	..	..	..	..	..	..	..	..	2	..	..

Comparative Statement of Freight Rates in Kentucky—Continued.

A=Rates in Effect on C., N. O. & T. P.
B=Rates Prescribed by Railroad Commission.
C=Amount of Reductions Prescribed by Railroad Commission.
D=Differences where Rates of C., N. O. & T. P. Ry. are Lower than Ky. Commissioners' Scale.

Distances.		Cents per 100 lbs.												Cents per bbl.		Cents per 100 lbs.	
		1	2	3	4	5	6	A	B	C	D	E	H	F	L	M	K
30 miles and over 25	A	21	19	16	14	11	10	10	13	10	8	11	12	16	5	5	5
	B	20	17	15	13	12	11	11	11	8	6	11	11	15	8	5	5
	C	1	2	1	1	..	..	..	2	2	2	..	1	1	..	..	..
	D	..	..	..	..	1	1	1	..	..	..	..	..	..	3	..	..
35 miles and over 30	A	24	22	20	15	12	10	10	13	10	9	12	15	18	5	5.5	5
	B	22	19	17	14	14	13	13	13	8	7	13	13	17	8	6	5
	C	2	3	3	1	..	..	..	..	2	2	..	2	1	..	..	..
	D	..	..	..	..	2	3	3	..	..	..	1	..	..	3	0.5	..
40 miles and over 35	A	24	22	20	15	12	10	10	13	10	9	12	15	18	5	5.5	5
	B	24	20	18	16	15	14	14	14	9	7	14	14	18	9	6	5
	C	..	2	2	..	..	..	..	..	1	2	..	1	..	..	..	..
	D	..	..	..	1	3	4	4	1	..	..	2	..	..	4	0.5	..
45 miles and over 40	A	25	24	21	15	13	10	10	13	10	10	13	15	20	5	6	6
	B	26	23	20	17	17	16	16	16	10	8	16	16	20	10	6	5
	C	..	1	1	..	..	..	..	..	..	2	..	..	..	..	..	1
	D	1	..	..	2	4	6	6	3	..	..	3	1	..	5	..	..

89 50 miles and over 45.....	A	25	24	21	15	13	10	10	13	10	10	13	15	20	5	6		6
	B	28	24	21	19	18	17	17	17	11	8	17	17	21	11	7		5
	C	..	..	..	..	..	..	..	..	..	2	..	..	..	..	..		1
	D	3	..	..	4	5	7	7	4	1	..	4	2	1	6	1		..
55 miles and over 50.....	A	26	24	21	15	13	10	10	13	10	10	13	15	20	5	6¼		7
	B	29	26	23	20	19	17	17	17	11	8	17	17	23	11	8		5
	C	..	..	..	..	..	..	..	..	..	2	..	..	..	..	..		2
	D	3	2	2	5	6	7	7	4	1	..	4	2	3	6	1¾		..
60 miles and over 55.....	A	26	24	21	15	13	10	10	13	10	10	13	15	20	5	6¼		7
	B	31	26	23	21	20	18	18	18	12	8	18	18	24	12	9		6
	C	..	..	..	..	..	..	..	..	..	2	..	..	..	..	..		1
	D	5	2	2	6	7	8	8	5	2	..	5	3	4	7	2¾		..
65 miles and over 60.....	A	26	25	21	15	13	10	10	13	10	10	13	15	20	5	6.5		7
	B	32	28	25	23	20	19	19	19	13	9	19	19	26	13	9		6
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..		1
	D	6	3	4	8	7	9	9	6	3	..	6	4	6	8	2.5		..
70 miles and over 65.....	A	26	25	21	15	13	10	10	13	10	10	13	15	20	5	6.5		7
	B	34	29	26	23	21	20	20	20	13	9	20	20	26	13	10		6
	C	..	..	..	..	..	..	..	..	..	1	..	..	..	..	..		1
	D	8	4	5	8	8	10	10	7	3	..	7	5	6	8	3.5		..
75 miles and over 70.....	A	28	25	21	15	13	10	10	13	10	10	13	15	20	5	7		8
	B	35	31	27	24	22	20	20	20	14	10	20	20	27	14	10		7
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..		1
	D	7	6	6	9	9	10	10	7	4	..	7	5	7	9	3		..
80 miles and over 75.....	A	28	25	21	15	13	10	10	13	10	10	13	15	20	5	7		8
	B	37	32	28	25	23	21	21	21	14	11	21	21	27	14	11		7
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..		1
	D	9	7	7	10	10	11	11	8	4	1	8	6	7	9	4		..

Comparative Statement of Freight Rates in Kentucky —Continued.

A=Rates in Effect on C., N. O. & T. P.
B=Rates Prescribed by Railroad Commission.
C=Amount of Reductions Prescribed by Railroad Commission.
D=Differences where Rates of C., N. O. & T. P. Ry. are Lower than Ky. Commissioners' Scale.

Distances.		Cents per 100 lbs.												Cents per bbl.		Cents per 100 lbs.	
		1	2	3	4	5	6	A	B	C	D	E	H	F	L	M	K
85 miles and over 80	A	28	27	23	17	15	12	12	15	10	10	15	17	20	6	7.5	8
	B	38	33	29	26	23	22	22	22	14	11	22	22	29	14	11	7
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1
	D	10	6	6	9	8	10	10	7	4	1	7	5	9	8	3.5	..
90 miles and over 85	A	28	27	23	17	15	12	12	15	10	10	15	17	20	6	7.5	8
	B	40	34	30	26	24	23	23	23	14	11	23	23	29	14	11	8
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	12	7	7	9	9	11	11	8	4	1	8	6	9	8	3.5	..
95 miles and over 90	A	28	27	24	18	16	14	14	18	11	11	16	17	20	6	8	8
	B	41	35	31	27	24	23	23	23	14	11	23	23	29	14	11	8
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	13	8	7	9	8	9	9	5	3	..	7	6	9	8	3	..
100 miles and over 95	A	28	27	24	18	16	14	14	18	11	11	16	17	20	6	8	8
	B	41	35	32	28	24	23	23	23	15	11	23	23	30	15	11	8
	C	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	D	13	8	8	10	8	9	9	5	4	..	7	6	10	9	3	..

110 miles and over 100.....	A	37	33	29	23	21	20	20	23	18	14	21	23	32	7	8.5	8
	B	42	36	32	29	25	23	23	23	15	11	23	23	30	16	12	8
	C	..	..	..	..	..	..	..	..	3	3	..	..	2	..	..	..
	D	5	3	3	6	4	3	3	..	..	..	2	..	..	9	3.5	..
120 miles and over 110.....	A	40	34	30	24	21	20	20	24	18	14	21	28	36	7	9	8
	B	44	38	33	29	26	24	24	24	16	12	24	24	32	17	12	8
	C	..	..	..	..	..	..	..	..	2	2	..	4	4	..	..	..
	D	4	4	3	5	5	4	4	..	..	..	3	..	..	10	3	..
130 miles and over 120.....	A	45	36	33	26	22	21	20	26	18	14	22	28	36	8	9.5	8
	B	45	39	35	31	27	25	25	25	16	12	25	25	32	17	13	9
	C	..	..	..	..	..	..	..	1	2	2	..	3	4	..	..	..
	D	..	3	2	5	5	4	5	..	..	..	3	..	..	9	3.5	1
140 miles and over 130.....	A	47	38	35	28	24	22	20	26	20	15	24	30	38	8¼	9.5	9
	B	47	40	35	32	28	26	26	26	17	13	26	26	33	18	13	9
	C	..	..	..	..	..	..	..	..	3	2	..	4	5	..	..	..
	D	..	2	..	4	4	4	6	..	..	..	2	..	..	9¾	3.5	..
150 miles and over 140.....	A	49	40	37	29	25	23	20	26	23	15	26	33	38	8½	10	9
	B	48	41	37	33	29	27	27	27	17	13	27	27	33	19	14	10
	C	1	..	..	..	..	..	..	..	6	2	..	6	5	..	..	..
	D	..	1	..	4	4	4	7	1	..	..	1	..	..	10½	4	1
160 miles and over 150.....	A	51	42	39	30	27	24	20	26	23	16	28	33	38	8¾	10	9
	B	50	43	38	34	30	28	28	28	17	14	28	28	35	20	14	10
	C	1	..	1	..	..	..	..	..	6	2	..	5	3	..	..	..
	D	..	1	..	4	3	4	8	2	..	..	..	..	..	11¼	4	1
170 miles and over 160.....	A	53	44	41	31	28	25	20	26	23	16	30	33	38	9	10¼	9
	B	51	44	39	35	32	29	29	29	17	14	29	29	35	20	14	11
	C	2	..	2	..	..	..	..	..	6	2	1	4	3	..	..	..
	D	..	..	..	4	4	4	9	3	..	..	..	..	..	11	3¾	2

Comparative Statement of Freight Rates in Kentucky —Continued.

90 A=Rates in Effect on C., N. O. & T. P.
B=Rates Prescribed by Railroad Commission.
C=Amount of Reductions Prescribed by Railroad Commission.
D=Differences where Rates of C., N. O. & T. P. Ry. are Lower than Ky. Commissioners' Scale.

Distances.		Cents per 100 lbs.												Cents per bbl.		Cents per 100 lbs.	
		1	2	3	4	5	6	A	B	C	D	E	H	F	L	M	K
180 miles and over 170.....	A	55	46	43	32	29	26	20	26	23	17	32	33	38	9¼	10.5	9
	B	53	45	40	36	32	29	29	29	18	14	29	29	36	21	15	11
	C	2	1	3	..	..	..	..	..	5	3	3	4	2	..	..	..
	D	..	..	..	4	3	3	9	3	..	..	..	..	..	11¾	4.5	2
190 miles and over 180.....	A	57	48	45	33	30	27	20	26	23	17	32	33	38	9.6	10.5	10
	B	54	47	41	37	33	30	30	30	18	14	30	30	36	22	15	11
	C	3	1	4	..	..	..	..	..	5	3	2	3	2	..	..	..
	D	..	..	..	4	3	3	10	4	..	..	..	..	..	12.4	4.5	1
200 miles and over 190.....	A	61	51	47	36	32	28	20	26	23	18	32	33	38	9¾	10.5	10
	B	56	48	41	38	34	31	31	31	19	15	31	31	38	23	16	12
	C	5	3	6	..	..	..	..	..	4	3	1	2	..	..	..	..
	D	..	..	..	2	2	3	11	5	..	..	..	..	..	13¼	5.5	2

91 The foregoing amended bill is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants filed their answer to complainant's amended bill, which said answer is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Answer.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The defendants, Adam T. Siler, McD. Ferguson and L. P. Tarlton, for answer to so much of complainant's amended bill as they are advised it is necessary for them to answer, say:

They admit that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 1," was made applicable to the complainant, the Louisville & Nashville Railroad Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky, and the Nashville, Chattanooga & St. Louis Railway Company, and that the Schedule of Maximum Freight Rates styled "Kentucky Railroad Commission's Standard Tariff No. 2," was made applicable to the Illinois Central Railroad Company. Defendants admit that neither of said tariffs was made applicable to the other railroads named by complainant except said Standard Tariff Number
92 1 was made applicable to the Chesapeake & Ohio Railway Company, and that no notice of said tariff has ever been served upon said latter company.

Defendants deny that said Commission either arbitrarily or without authority of law undertook to classify complainant with said three other companies or without such authority to prescribe a Schedule of Maximum Freight Rates for its observance. Defendants admit that the Legislature has never prescribed any Schedule of Maximum Freight Rates for complainant or the other railroads named, nor has this Commission prescribed any such maximum schedule other than as shown by its order of July 20, 1906. Defendants admit that said other railroads are engaged in the carrying of intra-state freight on their lines within the State of Kentucky. They deny that either of said railroads is permitted to or that they do receive higher rates than those prescribed as the maximum rates for complainant on the same classes of intra-state freight

or commodities for the same or any distances or that such companies are permitted to charge such freight rates as they might or may deem reasonable over their several lines in Kentucky. Defendants say that the circumstances and conditions as regards the business of conducting transportation in the State of Kentucky by said other railroads are entirely dissimilar to that of complainants and there is no similarity with respect to the original cost of construction, the present valuation, the capitalization, the volume of business, the earnings or operating expenses, the financial condition or general conditions with respect to conducting transportation by either of said companies to that of complainant and for this reason defendants did not make said schedule of Maximum Freight Rates applicable to either of said other railroads, and for the further
93 reason that the rates upon said other railroads except in a very few minor instances were not higher than the Schedule of Maximum Freight Rates so made by these defendants. Defendants deny that they have made any unlawful classification of said railroad companies or that they have prescribed or that they made any arbitrary or unlawful maximum intra-state freight rates for complainant or either of said railroad companies doing the same kind of business in Kentucky. They deny that their said order was or is a positive or other direct, unfair, or other discrimination against complainant in favor of such other companies, and they deny that the same amounts to a denial by the State of Kentucky and said Railroad Commission to complainant of the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, or any other section, or any other provision or Section of said Constitution.

As regards the table filed with complainant's amended bill purporting to show the schedule of complainant's freight rates existing at the time said Standard Tariff No. 1, and the order of said Commission was made, and as regards the table also filed by complainant purporting to show its commodity rates as compared with said Standard Tariff, and as to how many of complainant's rates existing at the time the order of the Commission was made were lower than such rates so made by said Commission, defendants, at this time, have not knowledge or information sufficient to enable them to state, and as to the truth of complainant's said allegation defendants demand the strictest proof. Defendants deny that said Commission had no power to make any order in reference to any of complainant's rates which were the same as those fixed in the Maximum Rates, Ken-
94 tucky Railroad Commission Standard Tariff No. 1, or any that were lower than said Standard Tariff.

Defendants deny that the Statute of the State of Kentucky under which the Commission acted is violative of the Fourteenth Amendment of the Constitution of the United States, particularly section One thereof, or of any other section or amendment of said Constitution.

Wherefore having fully answered defendants pray as in their

original answer and for all relief to which they in equity may appear to be entitled.

R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG,
C. C. McCHORD,
Attorneys for Defendants.

The foregoing answer is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, complainant filed its replication to defendants' answer, which replication is endorsed in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

95 *The Replication of the Above Named Complainant to the Answer of the Above Named Defendants to the Amended Bill.*

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants to the amended bill, for replication thereunto states that it does and will ever maintain and prove its said amended bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants to the amended bill is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly as in and by its said amended bill it has already prayed.

JOHN GALVIN,
Counsel for Complainant.

The foregoing replication is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following stipulation was filed in said cause, viz:

96 Circuit Court of the United States, Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Stipulation.

It is hereby stipulated by complainant and defendants as follows:

With the view of saving time and expense incident to taking proof in this case, if it shall turn out that there are grounds upon which the case can be decided without such evidence, complainant is to make a motion to instruct the Special Commissioner to report that the order of July 20, 1906, is void, basing such motion on such grounds as may be assigned in writing, and on the face of the pleadings in this cause, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky pending the inquiry which led to the order of July 20, 1906. Defendants are to object to the said motion and urge any ground of objection that seems to them fit, except as to the manner of raising the questions involved; which is waived; but defendants' counsel are to have reasonable notice of the time and place fixed for the hearing of such motion, unless the same shall be agreed upon between counsel for complainant and defendants. The making of this motion is not to be construed as a waiver of any other ground of relief which complainant has asserted in its bill, and especially is not to be considered as a waiver of the ground asserted in the bill that the rates fixed by the order are unreasonable and confiscatory.

If the said motion is decided in favor of complainant and
97 any decree based thereon is reversed upon appeal, such reversal is not to prejudice the right of the complainant to urge such other grounds of relief as are above stated. Pending said motion and any appeal from any order or decree based thereon, the further taking of proof before the Special Commissioner is to be suspended.

Each party is to aid the other in a speedy determination of said motion, and the speedy determination of any appeal which may be taken consequent upon the action of the Circuit Court thereon.

Nothing herein is to be deemed a waiver by the defendants of their right to make any objection they may wish to make to the jurisdiction of the court of this action.

May 2, 1908.

CIN., N. O. & T. P. R. CO.,
Per JOHN GALVIN.
A. P. H.
R. H. WINN,
T. H. PAYNTER,
B. H. YOUNG, &
C. C. McCHORD,
Att'ys for Def'ts.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following stipulation was filed in said cause, to-wit:

98 Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER, &c., Defendants.

Stipulation.

It is hereby stipulated and agreed between the undersigned counsel for complainant and defendants that the following are all the pleadings, demurrers and motions filed before said Commission pending the inquiry which led to the order of July 20, 1906, herein complained of, to wit:

1. Those made exhibits with the answer of the defendants to the bill of complaint of the Louisville & Nashville Railroad Company in the case of said Company against Adam T. Siler *et al.*, now pending in this court and being a companion case to this case.

2. The special and general demurrers and other motions set forth in the seventh paragraph of the bill of complaint herein. These motions and the special and general demurrers were substantially similar to those filed by the Louisville & Nashville Railroad Company, copies of which are attached to a stipulation similar to this which has been made in said cause.

3. It is stipulated and agreed that each and all of the foregoing motions and demurrers of the complainant had in said proceedings were overruled by said Commission before the defendant's said answers were filed therein.

In witness whereof the undersigned counsel have hereunto affixed their signatures this June 18, 1908.

99 JOHN GALVIN,
Per A. P. H.,
Attorney for Complainant.
R. H. WINN.
B. H. YOUNG,
T. H. PAYNTER, &
C. C. McCHORD,
Attorneys for Defendant.

The foregoing stipulation is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants filed their motion in said cause, which motion is in words and figures as follows, viz:

The United States Circuit Court for the Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

This day came the defendants and objected to complainant's written motion and grounds thereof, and moved the court, on the face of the pleadings, to enter an order dismissing this action, because

First. The bill does not show any equity; and the averments of defendant's answer with respect to questions raised by said motion must be taken as admitted.

100 Second. None of the grounds stated in said motion is sufficient to entitle complainant to the relief sought.

R. H. WINN,
B. H. YOUNG,
T. H. PAYNTER, &
C. C. McCHORD.
Attorneys for Defendants.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10th, 1908. Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the following motion was filed in said cause by complainant, viz:

Circuit Court of the United States, Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,
vs.
ADAM T. SILER ET AL., Defendants.

Motion.

This day came the complainant, and without waiving any other grounds for relief herein, or any other right to a final decree enjoining the enforcement of the order of the defendant Commission complained of, moved the Court, on the face of the pleadings, to instruct and direct the Special Commissioner herein to report that the order of the defendant Railroad Commission, purporting to establish "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Cincinnati, New Orleans & Texas Pacific Railway Company, made June 20, 1906, and pro-

101 mulgated July 20, 1906, herein complained of, is void, upon the following grounds, to-wit:

1. The statute commonly known as the McChord Act, approved March 10, 1900, undertakes to vest in said Commission, an administrative body, legislative, executive and judicial powers, in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, and is, therefore, unconstitutional and void.

2. Neither the said Statute nor any other Statute of the State of Kentucky provides for an appeal to a court from a final order of said Commission, nor for any judicial investigation or judicial review of the question of the reasonableness of any rate fixed by said Commission for services of a carrier thereafter to be rendered, before the carrier is required to put the same into force and effect, but makes such order conclusive as to the sufficiency of the rate thus fixed, and the carrier is thus deprived of its property without due process of law, and denied the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The said Act imposes such enormous fines as a result of an unsuccessful effort to test the validity of the same, or of any final order of said Commission fixing a rate for the services of a carrier to be thereafter rendered, as to render said Act, on its face, violative of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting any state from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

4. Said Act is unconstitutional and void because it undertakes to vest in said Commission, a non-judicial body, the judicial
102 power of adjudging a carrier guilty of extortion for charging, collecting or receiving an existing rate, as a jurisdictional fact, to be first ascertained, before fixing a rate which such carrier may charge, collect or receive for like services thereafter rendered, without affording the carrier thus convicted an opportunity to be heard in any court on the question of its guilt or innocence of the offense of extortion, or on the question of the reasonableness or sufficiency of the rate thus fixed after such conviction for like services thereafter rendered, whereby the carrier is deprived of its property without due process of law, and denied the equal protection of the laws guaranteed by the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Neither under the title nor the provisions contained in the body of said Act is said Commission authorized or empowered to prescribe and establish schedules of maximum rates or tariffs for the services of railroad carriers as is attempted to be done by the order promulgated July 20, 1906, herein complained of.

6. The allegations of the complaints on which the order complained of herein was made and promulgated by said Commission were insufficient to give jurisdiction to, or authorize said Commission to make said order, or to prescribe and establish the maximum rates or standard tariff for all of complainant's lines, between all stations, for all distances, on all classes of freight in the State of Kentucky even if said Act empowered said Commission to establish

and prescribe such maximum rates or tariffs upon complaints of any character or under any circumstances.

7. Said Commission, without assuming to find or condemn any of complainant's rates, except those set forth in its "Table A,
103 Local Freight Tariff," as extortionate—which was a jurisdictional fact or condition precedent, in any event, to its exercise of power (if any it had at all in that respect) to make or fix rates—by its said order undertook to forbid complainant to charge, collect or receive rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances than those shown in said Commission's "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Cincinnati, New Orleans & Texas Pacific Railway Company, whereby said Commission attempted to prohibit complainant from increasing or advancing any rate or rates it had or has in force and effect on any commodity or commodities belonging to either of the classes set out in said so-called "Standard Tariff No. 1," notwithstanding the fact that such commodity rate or rates had not been found by said Commission to be extortionate, and the further fact that they were and are lower for the same distances than the maximum class rates which said Commission by its said order prescribed and promulgated as reasonable.

8. Said Commission did not assume to find or condemn all of complainant's rates as extortionate but only such as were in excess of the mileage scale of rates fixed for the Louisville & Nashville Railroad Company and designated "Maximum Rates, Kentucky Railroad Commission, Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad Company." And although a large number of the rates of complainant were not in excess of such mileage scale of rates but only equal thereto, the said Commission undertook to forbid this complainant from charging, collecting or receiving for the transportation of commodities rates in excess of said maximum rates of the Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Rail-
104 road Company. And in this respect also this order was beyond the jurisdiction of the Commission and beyond the authority conferred on it by the statute and under which it purported to act.

So that the tariff prescribed for this complainant is void both in respect to the rates which complainant then had in force and which were the same as the rates prescribed in the said Maximum Tariff, and in respect to the rates which complainant then had in force and which were less than the rates prescribed in said Standard Tariff; and being so void in both of said respects, is entirely void, any valid part being not separable from the invalid part.

9. The said order shows on its face that the maximum rates therein prescribed, styled "Kentucky Railroad Commission's Standard Tariff No. 1, were arbitrarily made applicable to the complainant, and were not made applicable for the same distances and on the same classes of freight to all the other railroad companies operating lines in Kentucky, and although without statutory power or authority to classify the said railroad com-

panies in Kentucky on any basis whatever, for the purpose of prescribing freight rates to be charged and collected by them, the said Commission, by said order, undertook to prescribe such maximum freight rates to be observed by the complainant company, while other railroad companies operating lines in Kentucky were and are permitted to charge and collect higher rates on the same classes of freight for the said distances, or such freight rates as such other companies may deem reasonable, although said other companies were made defendants to and proceeded against under the same complaints before said Commission in the proceedings which culminated in the making of said order promulgated July 20, 1906, and
105 thus the attempted classification by said Commission in this respect was not based upon the character or value of the services rendered; and said order, therefore, is unfair and discriminating, and amounts to a denial to complainant of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

June 18th, 1908.

JOHN GALVIN,
Attorney for Complainant.

The foregoing motion is endorsed in words and figures as follows, viz: Filed July 10th, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, the opinion of the court was filed in the case of the Louisville & Nashville Railroad Company *vs.* Adam T. Siler, *et al.*, which said opinion, by the last paragraph thereof, this being one of the three other cases, is made a part of this cause, same being in words and figures as follows, viz:

United States Circuit Court, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
vs.
A. T. SILER, McD. FERGUSON, & L. P. TARLTON, Railroad Commissioners of Kentucky, Defendants.

This cause has been submitted on motion for a final decree as prayed in the bill, pursuant to stipulation of the parties.

106 In the case of Louisville & Nashville R. R. Co. *vs.* McChord, 103 Fed. 216, Judge Evans after full argument and careful consideration, held what is known as the McChord Act involved herein to be unconstitutional and enjoined the Railroad Commissioners from taking action thereunder. On appeal to the Supreme Court this decree was reversed.

McChord, *et al.*, *vs.* L. & N. R. R. Co., 183 U. S. 483.

It was not reversed, however, on the ground that he had erred in holding said act unconstitutional, but on the ground that the action enjoined was legislation and a court had no authority to enjoin an-

ticipated legislation. The question of constitutionality was waived and the only reference to it in the opinion was that it was a matter of "grave importance."

In the recent case of *In re* Young that went up from Minnesota, Mr. Justice Peckham cited Judge Evans' decision as an authority in support of the position there taken.

At the time of Judge Evans' decision this state had not been divided into two judicial districts. The decision was that of the United States Circuit Court for the District of Kentucky. This court has succeeded that court as to the Eastern District of Kentucky. In view of this, I do not think that I should consider the question on its merits. Comity requires that I should follow this holding of Judge Evans, backed up as it is, to a certain extent, by said reference to it by the Supreme Court. I, therefore, in accordance with said decision, hold said act unconstitutional.

In addition I think it is to the interest of the parties to get
107 this case to the Supreme Court as soon as possible where a decision can be had that is final as to the constitutionality of the act.

Until today I had not read the decision of the Supreme Court in the McChord case, all previous steps in this case, since the granting of the temporary restraining order, having been taken by consent of parties hereto; and I was under the impression that in that case the Supreme Court had overruled Judge Evans' holding that said act was unconstitutional. Otherwise, possibly, I might have indicated this position to the parties earlier in this cause.

Question is made as to the jurisdiction of this court of this case on the ground that there is no diversity of citizenship. Under the decision in the case of Raymond *v.* Chicago Traction Co. 207 U. S. 20, it would seem that this court has jurisdiction because of the federal question raised in the claim that the action of the Railroad Commissioners was in violation of the 14th amendment. If not, it has it because of the claim that said act itself is a violation thereof.

The motion is sustained and decree will be prepared accordingly.

Similar motions in the three other cases heard at same time are sustained and decrees in those cases will be prepared also.

July 10th, 1908.

A. M. J. COCHRAN, *Judge.*

The foregoing opinion is endorsed in words and figures as follows, viz: Filed July 10, 1908. Charles N. Wiard, Clerk.

108 On the same day, to-wit, on the 10th day of July, A. D. 1908, final decree was entered in said cause, which decree is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,

vs.

ADAM T. SILER ET AL., Defendants.

Final Decree.

This day came the complainant and tendered and offered to file its amended bill, which is ordered to be filed; to which amended bill defendants filed their answer, and to which answer complainant filed its general replication.

Thereupon came the counsel for complainant and counsel for defendants and tendered and offered to file their stipulation, dated May 2, 1908, and their stipulation dated June 18, 1908, which are ordered to be filed.

The counsel for complainant thereupon, in pursuance of said stipulations, entered their motion in complainant's behalf, dated June 18, 1908, and moved the Court on the face of the pleadings, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky, pending the inquiry which led to the order of July 20, 1906, and upon the written grounds set forth in said motion, to instruct the Special Commissioner herein to report that the order of the Railroad Commission of Kentucky, purporting to establish what is styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff-No. 1," Applicable to the Complainant, made June 20, 1906, and promulgated July 20, 1906, herein com-

109 plained of, is void.

Thereupon counsel for defendants filed their objections to complainant's said motion, and entered their motion in behalf of defendants, on the face of the pleadings and the written grounds set forth in their said motion, that the court enter an order dismissing this action.

And said motions having by agreement of counsel been set for hearing on this day, the same were fully argued by counsel for complainant and defendants, and the court being fully advised thereupon ordered, adjudged and decreed as follows:

1. That the said objections and motions of the defendants be and the same are overruled, and the said motion of the complainant be and the same is sustained, the court being of opinion that the act of the General Assembly of the Commonwealth of Kentucky, known as the McChord Act, approved March 10, 1900, and the order of the Railroad Commission of Kentucky, promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory (upon which no decision is or can now be made), violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibit any state from depriving any person of property without due process of law, and

from denying to any person within its jurisdiction the equal protection of the laws, and that said order of said Commission, so far as it is made applicable to complainant, is, therefore, null and void, and the Special Commissioner is directed so to report herein.

2. Thereupon counsel for complainant and defendants stipulated and agreed that the said report of the Commissioner shall be and it now is treated and considered as filed in the terms above prescribed.

And thereupon this cause was submitted for a final decree,
110 and the court being further advised, ordered, adjudged and decreed that the preliminary injunction heretofore granted herein be and the same is made perpetual, and the defendants, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, their successors in office, and said Commission, be and they are hereby perpetually enjoined and restrained from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, herein complained of, or putting the same into force or effect, and from enforcing or attempting to enforce the same, so far as it is made applicable to complainant, or so far as it relates to the lines of railroad owned or operated by complainant in the State of Kentucky, and from recommending or procuring indictments against complainant or any of its officers, agents or employés, to recover any fine or penalty for any violation of said order or for charging, collecting or receiving any rate or rates in excess of those prescribed by said order; and said defendants are further enjoined to revoke and cancel said order so far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," applicable to the Cincinnati, New Orleans & Texas Pacific Railway Company.

3. It is further ordered, adjudged and decreed by the court that the question of costs is not now determined but either party may, after the final determination of this cause in the Supreme Court of the United States, move for an order in regard thereto at the foot of the decree.

4. And then came defendants and in open court prayed and were allowed an appeal from this decree to the Supreme Court of
111 the United States.

Defendants shall execute a bond in the penalty of five hundred dollars, conditioned to prosecute said appeal, and file herein their assignment of errors—all within sixty days from the entry of this decree. No citation need be issued, the appeal being granted in open court and complainant being present.

The Assignment of Errors, referred to in the foregoing decree, is in words and figures as follows, viz:

In the Circuit Court of the United States for the Eastern District of Kentucky.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Complainant,

vs.

ADAM T. SILER ET AL., Defendants.

Assignment of Errors.

The above named defendants, Adam T. Siler, McD. Ferguson, and L. P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, conceiving themselves aggrieved by the judgment entered herein on the 10th day of July, 1908, in the above-entitled cause, pray the court that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the Supreme Court of the United States. Defendants say that in the record and proceedings in said above-entitled cause there is manifest error in this, to-wit:

1. The Circuit Court of the United States for the Eastern District of Kentucky erred in holding and deciding that said court was bound by and should follow the decision of the United
112 States Circuit Court for the District of Kentucky in the case of Louisville & Nashville Railroad Company *vs.* McChord, *et al.*, as reported in 103 Federal 216, and in its interpretation of the opinion in McChord, *et al.*, *vs.* Louisville & Nashville Railroad Company reported in 183 U. S. 483, reversing said former decree.

2. That said Court erred in rendering judgment against these defendants upon the pleadings in said cause; said judgment is contrary to law and the facts as presented by said pleadings.

3. That said Court erred in holding that the Act of the General Assembly of the Commonwealth of Kentucky, Approved March 10, 1900, and the order of the Railroad Commission of Kentucky promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory, violate the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which prohibit any State from depriving any person of property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws and in holding that said order of said Commission, as far as it is made applicable to complainant is either null or void and in directing that the Special Commissioner so report.

4. That said court erred in rendering a perpetual order of injunction against these defendants and their successors in office the said Commission, enjoining and restraining them from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, and from putting the same into force or effect, and from enforcing or attempting to enforce the same as far as it is

made applicable to complainant or as relates to the lines of railroad owned or operated by complainant in the State of Kentucky.

5. That said Court erred in adjudging that these defendants be further enjoined to revoke and cancel said order as far as it
113 prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," applicable to complainant and its said lines of railroad in Kentucky.

6. That said Court erred in overruling defendants' objections to complainant's motion and grounds of motion upon which motion and grounds the decree herein was rendered; and in overruling defendants' motion that on the face of the pleadings an order be entered dismissing this action; and said court further erred in sustaining complainant's said motion and grounds of motion, as follows:

(*a*) That said Act of March 10, 1900, undertakes to vest in said Commission Legislative, Executive, and Judicial powers in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky and that said Act is, therefore, unconstitutional, null and void;

(*b*) That because said Act does not provide for an appeal to a court from the final order of said Commission nor for any judicial investigation, or judicial review of the question of the reasonableness of any rate fixed by said Commission for services thereafter to be rendered before it is required to put same into force and effect, such order deprives the carrier of its property without due process of law and denies to it the equal protection of the laws in violation of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

(*c*) That the penalties imposed by said Act are so enormous as to render the Act on its face violative of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from depriving any person of
114 property without due process of law or denying to any person within its jurisdiction the equal protection of the laws; and

(*d*) That said Act is unconstitutional and void because it undertakes to vest in said Commission the judicial power of adjudging a carrier guilty of extortion before fixing a rate which the carrier may charge and without affording an opportunity to be heard in any court and thereby deprives the carrier of its property without due process of law and denies to it the equal protection of the laws guaranteed by the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States; and

(*e*) That said Commission was not authorized or empowered to prescribe and establish schedules of maximum rates; and

(*f*) That the allegations of the complaints on which the order complained of was made were insufficient to give the Commission jurisdiction or to authorize it to make said order; and

(*g*) That said Commission had no power to forbid complainant from charging or receiving rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances

than those shown in said Commission's Standard Tariff No. 1; and (*h*) That said Kentucky Railroad Commission's Standard Tariff No. 1 was arbitrarily made applicable to complainant and was not made applicable for the same distances and on the same classes of freight to all other railroad companies operating lines in Kentucky and on that account that said order is unfair, discriminating and amounts to a denial to complainants of the equal protection of the laws in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

115 Wherefore said Adam T. Siler, McD. Ferguson and L. P. Tarlton pray that the decree and order of the said Circuit Court of the United States for the Eastern District of Kentucky appealed from herein be reversed.

JAMES BREATHITT,
Att'y Gen'l,

R. H. WINN &
C. C. McCHORD,
Counsel for Defendants.

The foregoing Assignment of errors is endorsed in words and figures as follows, viz: Filed July 10, 1908, Charles N. Wiard, Clerk.

On the same day, to-wit, on the 10th day of July, A. D., 1908, defendants executed an appeal bond in said cause, which said bond is in words and figures as follows, viz:

Know all men by these presents, That We, Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, as principal-, and —— —— —— —— ——, as sureties, are held and firmly bound unto the Cincinnati, New Orleans & Texas Pacific Railway Company in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Cincinnati, New Orleans & Texas Pacific Railway Company, its certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of July, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court for the 10th day of July, in a suit depending in said Court, between The Cincinnati, New
116 Orleans & Texas Pacific Railway Campany, Complainant, and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission of Kentucky, Defendants, a decree was rendered against the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission of Kentucky, and the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said court to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission of Kentucky, shall prosecute their

appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. T. SILER, *Commissioner.*
McD. FERGUSON, *Commissioner.*
L. P. TARLTON, *Com'r.*

Sealed and delivered in presence of
EMILY H. COLEMAN.
CHAS. N. WIARD.

Approved by
A. M. J. COCHRAN,
U. S. District Judge.

The foregoing bond is endorsed in words and figures as follows, viz: Filed Jul- 10, 1908, Charles N. Wiard, Clerk.

117 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

I, Charles N. Wiard, Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing One Hundred and Fifteen (115) pages contain a true and complete copy of all the papers filed and proceedings had and entered in the cause, lately pending in the said court wherein the Cincinnati, New Orleans & Texas Pacific Railway Company was Complainant and Adam T. Siler, McDougal Ferguson and Lew P. Tarlton, Constituting the Railroad Commission of Kentucky, were defendants, as the same will appear from the records and files of my said Office; that I have compared the same with the originals, and it is a true and complete transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand as Clerk of the aforesaid Court, and affixed the seal thereof, at Frankfort, in said District, this the 11th day of August, A. D., 1908, and of the Independence of the United States the 133rd year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk United States Circuit Court, Eastern District of Kentucky, at Frankfort.

Endorsed on cover: File No. 21,320. E. Kentucky C. C. U. S. Term No. 524. Adam T. Siler, McDougal Ferguson, and Lew P. Tarlton, constituting the Railroad Commission of Kentucky, appellants, *vs.* Cincinnati, New Orleans & Texas Pacific Railway Company. Filed August 27, 1908. File No. 21,320.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 521.

ADAM T. SILER, ETC., APPELLANTS,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLEE.

No. 522.

ADAM T. SILER, ETC., APPELLANTS,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, APPELLEE.

No. 523.

ADAM T. SILER, ETC., APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, APPELLEE.

No. 524.

ADAM T. SILER, ETC., APPELLANTS,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, APPELLEE.

MOTION TO HEAR AS ONE CASE.

Come now the appellants, by James Breathitt, Attorney General of the State of Kentucky, and move the court to hear the above-styled four causes, in oral argument and by brief,

as one case, and in support of said motion appellants respectfully represent that said causes were heard and determined by the court below as one case. The same opinion and decree were entered in each of said causes, and the main question involved in each of said causes is the constitutionality of the act of the Legislature of the State of Kentucky of March 10, 1900, and of the validity of appellants' order under the powers conferred and the duties imposed by said act.

Appellants further respectfully represent that the constitutionality of said act was heard and considered by this honorable court in the case of McChord, etc., Railroad Commissioners, appellants, *vs.* The Louisville & Nashville Railroad Company and others, appellees, decided by this court in 183 U. S., 483, and in which case, with the exception of the Illinois company, the parties, appellants and appellees, were the same as in the case at bar, and for the reasons herein stated as well as those stated in the motion to advance and for oral argument, made simultaneously herewith, appellants say said causes ought to be heard by oral argument and by brief as one case.

Respectfully submitted,

JAMES BREATHITT,
Attorney General of Kentucky, for Appellants.

Office Supreme Court, U. S.
FILED.
NOV. 27 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 521

ADAM T. SILER, ET AL., AS THE RAILROAD COMMISSION OF KENTUCKY, APPELLANTS,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

No. 522

SAME

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

No. 523

SAME

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY.

No. 524

SAME

vs.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

OBJECTIONS TO MOTION TO HEAR AS ONE CASE.

HENRY L. STONE,

General Counsel for Louisville and Nashville Railroad Company.

(21,317, 21,318, 21,319 AND 21,320)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 521.

ADAM T. SILER, ET AL., AS THE RAILROAD COMMISSION OF KENTUCKY, - - - - - *Appellants,*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellee.*

No. 522.

ADAM T. SILER, ETC., - - - - - - - - - - - - *Appellants,*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, - - - - *Appellee.*

No. 523.

ADAM T. SILER, ETC., - - - - - - - - - - - - *Appellants,*

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, - *Appellee.*

No. 524.

ADAM T. SILER, ETC., - - - - - - - - - - - - *Appellants,*

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, - - - - - - - - *Appellee.*

OBJECTIONS TO MOTION TO HEAR AS ONE CASE.

Comes now the Louisville & Nashville Railroad Company, appellee in case No. 521, and objects to the motion of appellants to hear all four of the foregoing cases as *one case,* and for grounds of its objections presents the following, to-wit:

I.

There are two important and material questions involved in case No. 521, in which the Louisville & Nashville Railroad Company is appellee, not common to the other three cases, Nos. 522, 523 and 524. These two questions are embraced in grounds Nos. 5 and 6 of this appellee's motion in the court below to instruct the Special Commissioner to report that the order of the Railroad Commission of Kentucky, promulgated July 20, 1906, is void, which motion was sustained, resulting in the decree appealed from (Record, Case No. 521, pp. 171-3), which holds the Act of the Kentucky Legislature, known as the McChord Act, approved March 10, 1900, to be unconstitutional and void, and perpetually enjoins the enforcement of said order of the Kentucky Railroad Commission.

The said grounds which embrace questions not common to the other three cases are stated as follows (Record, Case No. 521, pp. 167-8):

5. Said Act, without attempting to repeal the charter of the conplaintant, which fixes maximum rates which it may charge for its services, attempts to empower and authorize said Commission to subject complainant to criminal prosecution and heavy punishment for charging the rates authorized in its charter.

6. Said Act and order complained of undertake to impair the obligation of the existing contract between complainant and the State of Kentucky, whereby, under complainant's legislative charter and the amendments thereto, complainant is authorized and empowered to charge and collect for the transportation of goods, merchandise and property of any kind any sum on its railroads in Kentucky not exceeding the maximum rates prescribed by the provisions of its said charter and the amendments thereto, which have never been repealed by the General Assembly of Kentucky, and are still in force and effect, as set force in paragraph II of its original bill, whereas the maximum rates attempted to

be prescribed by the order complained of are far less than those prescribed by its said charter and the amendments thereto on the same kind of commodities and property for the same distances, in violation of that provision of Sub-Section One (1), Section Ten (10), Article One (1) of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts."

II.

In Case No. 521, the amount involved, or the loss in revenue to this appellee, which would result from the reduction in its freight rates by an enforcement of the order of the Kentucky Railroad Commission complained of, is not less than $200,000 per annum (Record, Case No. 521, p. 43), a much larger sum than is involved in all the other three cases combined; and counsel for the appellee, Louisville & Nashville Railroad Company, is entitled to, under the rules of this Court, and, in behalf of that Company, will need to occupy, two hours in oral argument to fairly and reasonably discuss the questions involved, and present the existing grounds for the affirmance of the decree appealed from in Case No. 521.

III.

The appellees in these four cases are represented by separate counsel, all of whom are entitled to be heard in the oral argument in behalf of their respective clients, and if these cases should be ordered to be heard as *one case,* there would be, under the rules of this Court, only two hours allotted the counsel for appellees in all four of the cases, which, in view of the important legal questions involved, and assuming that each of the counsel for the other appellees desire to take part in the oral argument of these cases, would be insufficient and practically amount to the submission of Case No. 521 without oral argument, greatly to the prejudice of the substantial rights of the appellee therein.

IV.

The statement contained in appellants' *Motion to Hear as One Case* that the constitutionality of said McChord Act was heard, considered and decided by this Court in *McChord, et al. vs. Louisville & Nashville Railroad Company, et al.*, 183, *U. S.* 483, is not correct and is misleading, for, in those cases, this Court declined to consider that question, and held that, as the Kentucky Railroad Commission had not made any order reducing rates under that Act, the suits for injunctions had been instituted prematurely, and reversed the decrees of the court below (103 Fed 216) on that ground alone, with direction that the bills be dismissed. The only reference to the question of the constitutionality of said Act by this Court was the following clause at the close of its opinion: (Ib. 502): "We are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication."

V.

In the event the Court overrules the foregoing objections and orders these four cases heard together as *one case*, it is respectfully submitted that the time allowed to the counsel for appellees for oral argument should be fixed at not less than four hours.

HENRY L. STONE,
General Counsel for
Louisville & Nashville
Railroad Company.

November 30, 1908.

Office Supreme Court, U. S.
FILED.
NOV 6 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 521.

ADAM T. SILER ET AL., AS THE RAILROAD COMMISSION OF KENTUCKY, APPELLANTS,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

MOTION TO ADVANCE.

JAMES BREATHITT,
Attorney General of Kentucky, for Appellants.

(21,317.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 521.

ADAM T. SILER ET AL., APPELLANTS,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLEE.

MOTION TO ADVANCE.

Come now the appellants, by James Breathitt, Attorney General of the State of Kentucky, and respectfully move the court to advance said cause on the docket of said court and assign the same for oral argument at the earliest possible time, and in support of said motion the appellants respectfully represent that the above-entitled cause involves the validity of an act passed by the Legislature of the State of Kentucky on the 10th day of March, 1900, which said act is entitled "An act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents, and employés, from charging, collecting, or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions."

That this is an appeal from a decree rendered in an action instituted by appellee, in the Circuit Court of the United States for the Eastern District of Kentucky, enjoining appellants, who constitute the Railroad Commission of Kentucky,

to revoke and from enforcing its order promulgated July 20, 1906, prescribing for appellee a schedule of maximum freight rates made pursuant to said act of March 10, 1900, which order of injunction was granted and made perpetual by said Circuit Court, and said act was by the judgment of said court rendered July 10, 1908, declared to be unconstitutional (pages 171-2-3 of Record); that the validity of said act was theretofore involved in the case of Louisville & Nashville Railroad Company *vs.* McChord *et al.*, in the United States Circuit Court for the District of Kentucky, and was by said Circuit Court on July 16, 1900, held to be unconstitutional (103 Fed., 216), and which cause was, upon appeal to this honorable court, reversed on the 6th day of January, 1902 (183 U. S., 483).

The appellants further respectfully show that the right to enforce the said order of said commission, and the speedy determination of the question as to the validity of said act of March 10, 1900, and the power of the Railroad Commission of Kentucky thereunder, is a matter in which the public generally is vitally interested.

Wherefore, on account of a general public interest in the questions involved in this case and the importance of an early and speedy decision of the vital legal propositions involved, the said appellants make this motion to advance the hearing of said cause and to assign the same for oral argument at the earliest possible time which would suit the convenience of the court.

JAMES BREATHITT,
Attorney General of Kentucky, for the Appellants.

In behalf of the appellee service of notice of the foregoing motion is accepted, and the motion to advance is assented to, provided this case is to be heard as a separate case and not as one case with any other case or cases, to which appellee objects.

This October 24, 1908.

HENRY L. STONE,
General Counsel for Appellee.

JUDD & DETWEILER, INC.
PRINTERS,
WASHINGTON, D. C.

Office Supreme Court, U. S.
FILED.
NOV 6 1908
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 522.

ADAM T. SILER ET AL., AS THE RAILROAD COMMISSION OF KENTUCKY, APPELLANTS,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

MOTION TO ADVANCE.

JAMES BREATHITT,
Attorney General of Kentucky, for Appellants.

(21.318.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1908.

No. 522.

ADAM T. SILER ET AL., APPELLANTS,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
APPELLEE.

MOTION TO ADVANCE.

Come now the appellants, by James Breathitt, the Attorney General of the State of Kentucky, and respectfully move the court to advance said cause on the docket of said court, and assign the same for oral argument at the earliest possible time, and in support of said motion respectfully represent that said cause involves the validity of an act passed by the Legislature of the State of Kentucky on the 10th day of March, 1900, which said act is entitled "An act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents and employés from charging, collecting, or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions."

That this is an appeal from a decree rendered in a suit instituted by appellee, in the Circuit Court of the United States for the Eastern District of Kentucky, in enjoining appellants, who constitute the Railroad Commission of Kentucky to revoke, and from enforcing its order promulgated July 20,

1906, prescribing for appellee a schedule of maximum freight rates, made pursuant to said act of March 10, 1900, which order of injunction was granted and made perpetual by said Circuit Court, and said act was by the decree of said court rendered July 10, 1908, declared to be unconstitutional (pages 78, 79, and 80, of the printed Record); that the validity of said act was theretofore involved in the case of Louisville & Nashville Railroad Company *v.* McChord *et al.*, in the United States Circuit Court for the District of Kentucky, and was by the said Circuit Court on July 16, 1900, held to be unconstitutional (103 Federal Reporter, 216), and which cause was, upon appeal to this honorable court, reversed on the 6th day of January, 1902 (183 U. S., 483).

Said appellants further respectfully show that the right to enforce the said order of said commission, and the speedy determination of the question as to the validity of said act of March 10, 1900, and the power of the Railroad Commission of Kentucky thereunder, is a matter in which the public generally are vitally interested.

Wherefore, on account of a general and public interest in the questions involved in this case and the importance of an early and speedy decision of the vital legal propositions involved, and because the questions presented have been heretofore argued before and considered by this court in 183 U. S., 483, the said appellants move the court to advance the hearing of said cause and to assign the same for oral argument at the earliest possible time which would suit the convenience of the court.

JAMES BREATHITT,
Attorney General of Kentucky, for the Appellants.

I am of counsel for appellee in this suit, and am of opinion that its hearing should be advanced and the case assigned for oral argument at the earliest practicable day consistent with the convenience of the court, and appellee unites in the foregoing motion to advance waiving service of notice.

EDMUND F. TRABUE,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 523.

ADAM T. SILER ET AL., APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, APPELLEE.

MOTION TO ADVANCE.

Come now the appellants, by James Breathitt, Attorney General of the State of Kentucky, and respectfully move the court to advance said cause on the docket of said court and assign the same for oral argument at the earliest possible time, and in support of said motion the appellants respectfully represent that the above-entitled cause involves the validity of an act passed by the Legislature of the State of Kentucky on the 10th day of March, 1900, which said act is entitled "An act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents, and employés, from charging, collecting, or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of said act and penalties for the violation of its provisions."

That this is an appeal from a decree rendered in an action instituted by appellee, in the Circuit Court of the United

States for the Eastern District of Kentucky, enjoining appellants, who constitute the Railroad Commission of Kentucky, to revoke and from enforcing its order promulgated July 20, 1906, prescribing for appellee a schedule of maximum freight rates made pursuant to said act of March 10, 1900, which order of injunction was granted and made perpetual by said Circuit Court, and said act was by the judgment of said court rendered July 10, 1908, declared to be unconstitutional (pages 171-2-3 of Record); that the validity of said act was theretofore involved in the case of Louisville & Nashville Railroad Company *vs.* McChord *et al.*, in the United States Circuit Court for the District of Kentucky, and was by said court on July 16, 1900, held to be unconstitutional (103 Fed., 216), and which cause was, upon appeal to this honorable court, reversed on the 6th day of January, 1902 (183 U. S., 483).

The appellants further respectfully show that the right to enforce the said order of said commission and the speedy determination of the question as to the validity of said act of March 10, 1900, and the power of the Railroad Commission of Kentucky thereunder, is a matter in which the public generally is vitally interested.

Wherefore, on account of a general public interest in the questions involved in this case and the importance of an early and speedy decision of the vital legal propositions involved, the said appellants make this motion to advance the hearing of said cause and to assign the same for oral argument at the earliest possible time which would suit the convenience of the court.

JAMES BREATHITT,
Attorney General of Kentucky, for Appellants.

The Southern Railway Company in Kentucky, by Alex. P. Humphrey, counsel, accepts notice of the above motion and unites therein.

ALEX. P. HUMPHREY,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 524.

ADAM T. SILER ET AL., APPELLANTS,

vs.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, APPELLEE.

MOTION TO ADVANCE.

Come now the appellants, by James Breathitt, Attorney General of the State of Kentucky, and respectfully move the court to advance said cause on the docket of said court, and assign the same for oral argument at the earliest possible time, and in support of said motion the appellants respectfully represent that the above-entitled cause involves the validity of an act passed by the Legislature of the State of Kentucky on the 10th day of March, 1900, which said act is entitled "An act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents and employés from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of said act and penalties for the violation of its provisions."

That this is an appeal from a decree rendered in an action instituted by appellee, in the Circuit Court of the United States for the Eastern District of Kentucky, enjoining plaintiffs in error, who constitute the Railroad Commission of

Kentucky, to revoke, and from enforcing its order promulgated July 20, 1906, prescribing for defendant in error a schedule of maximum freight rates, made pursuant to said act of March 10, 1900, which order of injunction was granted and made perpetual by said Circuit Court, and said act was by the judgment of said court rendered July 10, 1908, declared to be unconstitutional (pages 171-2-3 of Record); that the validity of said act was theretofore involved in the case of Louisville & Nashville Railroad Company *vs.* McChord *et al.*, in the United States Circuit Court for the District of Kentucky, and was by said Circuit Court on July 16, 1900, held to be unconstitutional (103 Fed., 216), and which cause was, upon appeal to this honorable court, reversed on the 6th day of January, 1902 (183 U. S., 483).

The appellants further respectfully show that the right to enforce the said order of said commission and the speedy determination of the question as to the validity of said act of March 10, 1900, and the power of the Railroad Commission of Kentucky thereunder, is a matter in which the public generally is vitally interested.

Wherefore, on account of a general public interest in the questions involved in this case and the importance of an early and speedy decision of the vital legal propositions involved, the said appellants make this motion to advance the hearing of said cause and to assign the same for oral argument at the earliest possible time which would suit the convenience of the court.

JAMES BREATHITT,
Attorney General of Kentucky,
for the Plaintiffs in Error.

In behalf of the defendant in error service of notice of the foregoing motion is accepted, and the motion to advance is assented to.

This October 24, 1908.

JOHN GALVIN,
Attorney for Defendant in Error.

Office Supreme Court, U. S.
FILED.
JAN 6 1909
JAMES H. McKENNEY,
CLERK.

521-522-523 AND 524

In the Supreme Court of the United States.

OCTOBER TERM 1908.

ADAM T. SILER, et al - - - - - - - - Appellants

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

And Three Other Cases Heard Therewith, - Appellees.

BRIEF FOR APPELLANTS.

JAMES BREATHITT,
Atty. General of Ky.

C. C. McCHORD,
Counsel for Appellants.

THE COURIER PRINTING CO., LOUISVILLE.

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State v. R. R., 33 Kan. 176;

N. Y. Health Dept. v. Trinity Church, 145 N. Y. 32;

San Diego v. Nat. City, 174 U. S. 740.

R. R. v. Board of Commrs., 78 Fed. 258.

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Va. Corp. Commission v. Atl. C. L., decided Nov. 30, 1908;

Atl. C. L. v. North Carolina, 206 U. S. 20;

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Reagan v. Trust Co., 154 U. S. 362;

Lake Shore v. Smith, 173 U. S. 684;

R. R. v. Gill, 156 U. S. 664;

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R. R. v. Blake, 94 U. S. 180;
Munn v. Illinois, 94 U. S. 113;
Stone v. Trust Co., 116 U. S. 307;
Storrs v. Railroad, 29 Fla. 617; 11 S.R. 227;
Ga. R. R. v. Smith, 128 U. S. 174;
Dow v. Beidelman, 125 U. S. 680;
Budd v. New York, 143 U. S. 517;
Cov. Turnpike Co. v. Sanford, 164 U. S. 578.

Ky. Act of March 10, 1900, does not confer judicial power on the commission, and the making of a rate is not the enforcement of a judgment or the infliction of a penalty.

McChord v. L. & N., 183 U. S. 483;
L. & N. v. Comth., 183 U. S. 505;
Western Union v. Myatt, 98 Fed. 341, 345;
State v. Johnson, 60 Pac. 1068;
R. R. v. Inters. Com. Com., 162 U. S. 184;
Inters. Com. Com. v. R. R., 167 U. S. 507;
Inters. Com. Com. v. R. R., 168 U. S. 144;
State v. Wilson, 28 S. E. R. 554.

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Va. Corp. Commission v. Atl. C. L. (Nov. 30, 1908).
Fitts v. McGhee, 172 U. S. 516;
R. R. v. Minnesota, 134 U. S. 418;
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L. & N. v. Comth., 46 S. W. 707;
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L. & N. v. Ky. 183 U. S. 505;
Munn v. Illinois, 94 Ill. 113;
Stone v. Trust Co., 116 U. S. 307;
Wabash R. R. v. Illinois, 118 U. S. 557;
R. R. v. Jones, 149 Ill. 384;
Endlich on Interp. of Stat., §169.

This is but an exemplification of the general rule which presumes statutes to be constitutional

Smyth v. Ames, 169 U. S. 466;
Reagan v. Trust Co., 154 U. S. 362;
R. R. v. Smith, 173 U. S. 684;
Railroad v. Wellman, 143 U. S. 339;
Southern Pac. v. R. R. Com., 78 Fed. 236;
R. R. v. Tompkins, 176 U. S. 173.

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R. R. v. Lander, 20 Ky. Law Rep. 913;
R. R. v. Mississippi, 133 U. S. 587;
R. R. v. Pennsylvania, 145 U. S. 192;
Tiedeman on State and Fed. Control, 1056;
Plassey v. Ferguson, 163 U. S. 537;
Stone v. Trust Co., 116 U. S. 307;
C. & O. R. R. v. Ky., 179 U. S. 388.

That state and interstate commerce may be intermingled, and have a close relation one to the other, does not prevent the state from controlling that which is state or domestic commerce.

Smyth v. Ames, 169 U. S. 466;
R. R. v. Tompkins, 176 U. S. 167;
Reagan v. Trust Co., 154 U. S. 362.

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Cyclopedia of Law and Proceedure, vol. 12, 949;
Brown v. Comth. of Ky., 100 Ky. 127 (37 S. W. Rept. 496).
Wilson v. Comth. of Ky., 26 Ky. Law Rep. 685 (83 S. W. Rep. 427);
Standard Oil Cases (87 S. W. Rep. 1092 and 1131 and 29 Ky. Law Rep. 20);
Cawein v. Comth. of Ky., 22 Ky. Law Rep. 1736 (61 S. W. Rep. 275);
Parish v. N. C. & St. L. Ry., 49 Am. Rep. 655;
Am. and Eng. Ency. of Law, 2nd Ed., vol. 13, p. 65;
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Davidson v. New Orleans, 96 U. S. 102;
Murray's Lessee v. Hoboken Land Co., 18 How. 272;
Dent v. W. Va., 129 U. S. 114;
Iowa Cent. R. R. v. Iowa, 204 U. S. 255;
Wilson v. N. C., 169 U. S. 586;
Hurtado v. Cal., 110 U. S. 535;

Paulson v. Portland, 149 U. S. 41;
Hibben v. Smith, 191 U. S. 393;
L. & N. v. Schmidt, 177 U. S. 236.

The State may distinguish, select and classify objects of legislation without denying equal protection of the laws:
Missouri Ry. Co. v. Mackey, 127 U. S. 209;
Barbier v. Connelly, 13 U. S. 32;
Soon Hing v. Crowley, 113 U. S. 703;
Ky. Ry. Tax Cases, 115 U. S. 322;
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Reagan v. Trust Co., 154 U. S. 362;
R. R. v. Tompkins, 176 U. S. 167;
Smyth v. Ames, 169 U. S. 540, 547;
Id. 64 Fed. 165;
Cov. Turnpike v. Sanford, 164 U. S. 578;
Id. 14 Ky. Law Rep. 689; 20 S.W. 1031;
Munn v. Illinois, 94 U. S. 113;
R. R. v. Gill, 156 U. S. 664;
R. R. v. Minnesota, 134 U. S. 418;
R. R. v. Iowa, 94 U. S. 164;
Stone v. Trust Co., 116 U. S. 307;
Storrs v. R. R., 29 Fla. 617; 11 S. R. 227;
Ruggles v. Illinois, 108 U. S. 526;
Budd v. New York, 143 U. S. 517;

Comth. v. Cov. Bridge, 14 Ky. Law Rep. 836; 21 S. W. 1042.

Classification proceeding on any difference which has a reasonable relation to the subject matter sought to be accomplished is unobjectionable, though inequality results. Railroads have always formed a separate and distinct class.

R. R. v. Matthews, 174 U. S. 96;
Barbier v. Connolly, 113 U. S. 27;
Williams v. Mississippi, 170 U. S. 214;
Grundling v. Chicago, 177 U. S. 183;
Budd v. New York, 143 U. S. 517;
Dow v. Beidelman, 125 U. S. 680;
Magoun v. Trust Co., 170 U. S. 282;
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R. R. v. McKee, 127 U. S. 205;
R. R. v. Beckwith, 129 U. S. 26;
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Fertilizing Co. v. Hyde Park, 97 U. S. 659;
L. & N. R. R. v. Ky., 161 U. S. 677;
Boston Beer Co. v. Massachusetts, 97 U. S. 25;
N. O. Gas Light Co. v. Louisiana Light Co., 115 U. S. 650;

Mugler v. Kansas, 123 U. S. 623;
Slaughter House Cases, 111 U. S. 746;
Ruggles v. Illinois, 108 U. S. 536;
New Jersey v. Yard, 95 U. S. 104;
Stone v. Trust Co., 116 U. S. 307;
R. R. v. Illinois, 146 U. S. 387;
R. R. v. Nebraska, 170 U. S. 57;
R. R. v. Bristol, 151 U. S. 556;
R. R. v. Defiance, 167 U. S. 88;
Persall v. R. R. 161 U. S. 648;
R. R. v. Transp. Co., 25 W. Va. 324.

For a charter provision to come to an irrevocable contract fixing rates for all time, it must be clear, to the exclusion of a reasonable doubt, and must contain words exempting the corporation from future control. Merely to fix a maximum rate in the charter is not sufficient.

Tiedeman on State and Federal Control, 952, 955;
Russell on Police Powers of State, 127, 128;
Cent. Transp. Co. v. Pullman, 139 U. S. 49;
Minott v. R. R., 18 Wall. 204;
Bailey v. Maguire, 22 Wall. 215;
Stone v. Wisconsin, 94 U. S. 181;
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Ruggles v. Illinois, 108 U. S. 536;
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R. R. v. Illinois, 108 U. S. 541;
Stone v. Trust Co., 116 U. S. 307, 347;
Banking Co. v. Smith, 128 U. S. 174;
R. R. v. Minnesota, 134 U. S. 418, 467;
Smyth v. Ames, 169 U. S. 466;
Turnpike v. Sanford, 164 U. S. 578;
Id. 14 Ky. Law Rep. 689;

Comth. v. Covington Bridge, 21 S. W. 1042;
R. R. v. Miller, 132 U. S. 75;
Winchester Turnpike Co. v. Croxton, 98 Ky. 739; 33 L. R. A. 189;
Ragan v. Aiken, 9 Lea (Tenn.) 610;
Water Co. v. Fergus, 178 Ill. 571; 53 N. E. 363;
City of Danville v. Danville Water Co., 178 Ill. 399; 53 N. E. 118;
Id. 180 Ill. 235, 54 N. E. 224;
Freeport Water Co. v. City of Freeport, 57 N E. 862.

A reservation of the right to alter, amend or repeal, expressed either in a general law or in the charter prevents a provision from becoming an irrevocable contract.

Tiedeman State and Fed. Control, 980;
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IN THE

Supreme Court of the United States.

OCTOBER TERM 1908.

ADAM T. SILER, ETC., ... *Appellants.*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY . . *Appellee.*

ADAM T. SILER, ETC., ... *Appellants.*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY . . . . . *Appellee.*

ADAM T. SILER, ETC., ... *Appellants.*

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY . . . *Appellee.*

ADAM T. SILER, ETC., ... *Appellants.*

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY . . . . . *Appellee.*

STATEMENT.

The above-entitled four causes have been ordered heard together, and are appealed from final decrees of the Circuit Court of the United States for the Eastern District of Kentucky, entered on the 10th day of July, 1908, perpetually enjoining the appellants, the Railroad Commissioners of the State of Kentucky, to revoke, and from enforcing, its order made June 20, 1906, and promulgated July 20, 1906, prescribing for each of appellees a schedule of maximum freight rates for the transportation of commodities to and from points wholly within the

State of Kentucky, and from exercising any authority or doing any of the things required by an Act of the General Assembly of the Commonwealth of Kentucky, approved March 10, 1900, which is in words and figures as follows:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten day's notice by letter mailed to an officer or employee of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll, or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employee of the railroad company or corporation

affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employee thereof, charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered, than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employee, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars and upon a second conviction in any sum not less than one thousand dollars, nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars, nor more than five thousand dollars.

"Sec. 2. The Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of a county where such offense may be committed by said officer, agent or employee, shall have jurisdiction in all prosecutions against said officer, agent or employee.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or no-

tary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment."

For the purposes of convenience we shall designate first named appellee, Louisville & Nashville Railroad Company, as the Louisville Company, the second appellee, the Illinois Central Railroad Company, as the Illinois Company, the third appellee, the Southern Railway Company in Kentucky, as the Southern Company, and the fourth appellee, the Cincinnati, New Orleans and Texas Pacific Railway Company, as the Cincinnati Company.

On the 25th day of July, 1906, all of the above appellees filed their bills in equity in the United States Circuit Court for the Eastern District of Kentucky seeking a temporary injunction, and on final decree a perpetual injunction issued against the Railroad Commission of Kentucky, then composed of C. C. McChord, McD. Ferguson and Adam T. Siler, restraining them from exercising any of the powers or doing any of the acts set forth in the above act, and from enforcing said order of said Commission, and requiring them to revoke the same. On the 27th day of July, 1906, the temporary restraining order was entered by the Court against each of said Railroad Commissioners in conformity with the prayer of the bill. Afterward, to-wit: on the —— day of November, 1906, said C. C. McChord resigned his office of Railroad Commissioner, and thereafter, to-wit: on the 10th day of December, 1906, his successor in office, L. P. Tarlton, was inducted into office and entered upon the discharge of his duties.

All of the bills are apparently drawn upon the same lines, make substantially the same allegations and pray the same relief, and the questions involved are common

to all, except that in the bill of the Louisville Company the additional question of a contract with the State of Kentucky relative to rates that can be charged, is raised.

The Louisville Company is a corporation of the State of Kentucky, operating lines within the State under original construction or acquisition by purchase of twelve hundred and sixty-five (1,265) miles, and its total mileage operated in and out of the State is four thousand two hundred and ninety (4,290) miles. The gravamen of its complaint is that the Act of March 10, 1900, and the order of the Railroad Commission, entered June 20, 1906, and promulgated July 20, 1906, operates to deprive it of its property without due process of law, and to deny it the equal protection of the law, and that the act is an attempt by the State to regulate Interstate Commerce, and is an interference with its contract with the State of Kentucky claimed to have been acquired under and by virtue of its original charter granted by the State of Kentucky on March 5, 1850, and that neither said Act nor any other law of the State of Kentucky conferred the power upon the Railroad Commission to make and promulgate the order of July 20, 1906.

The Illinois Company is a corporation of the State of Illinois, operating about 575 miles of railroad in the State of Kentucky as a part of its system of more than 4,370 miles in extent as traversed in several States. The allegations of this bill are similar to those of the Louisville Company, except that it claims no contract right.

The Southern Company is a corporation organized under the laws of the State of Kentucky operating, as alleged in its bill, one hundred and thirty-eight (138) miles of railroad, and the allegations of its bill are similar to those of the Louisville Company, except that it claims no contract right.

The Cincinnati Company is a corporation organized under the laws of the State of Ohio, operating one hun-

dred and ninety-seven miles of railroad in the State of Kentucky, and in addition thereto it operates a line of railroad in the States of Ohio and Tennessee. The allegations of its bill are also similar to those of the Louisville Company, except that it claims no contract right.

On the 27th day of February, 1907, an order was made and entered in each of said causes, appointing a Special Commission to take such evidence as might be offered by the parties, and to make report thereon to the Court and to make special finding of facts set forth in the order. Said order will be found on page 141 of the printed record of the Louisville Company, and the same order was entered in each of the other cases. Subsequently, to-wit: on the 10th day of July, 1908, and after appellees had taken the depositions of many of their principal witnesses before the Special Master, a motion was filed by each of the appellees, moving the Court on the face of the pleadings to instruct and direct the Special Commissioner to report that the order of the Railroad Commission purporting to establish maximum rates made June 20, 1906, and promulgated July 20, 1906, is void upon numerous grounds therein set forth. This motion will be found on page 166 of the record of the Louisville Company. On the same date, to-wit: July 10, 1908, appellants filed written objections to the said motion, which will be found on page 169 of the record of the Louisville Company.

Thereupon, on said date said motions and objections were heard by the Court and a final decree was entered in each of the cases overruling appellant's objection to the motion and sustaining appellee's said motion, and a final order entered making the temporary injunction perpetual, the decree reading as follows:

> "This day came the complainant and tendered and offered to file its amended bill, which is ordered

to be filed; to which amended bill defendants filed their answer, and to which answer complainant filed its general replication.

"Thereupon came the counsel for complainant and counsel for defendants and tendered and offered to file their stipulation, dated May 2, 1908, and their stipulation dated June 18, 1908, which are ordered to be filed.

"The counsel for complainant thereupon, in pursuance of said stipulation, entered their motion in complainant's behalf, dated June 18, 1908, and moved the Court on the face of the pleadings, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky, pending the inquiry which led to the order of July 20, 1906, and upon the written grounds set forth in said motion, to instruct the Special Commissioner herein to report that the order of the Railroad Commission of Kentucky, purporting to establish what is styled 'Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1,' applicable to the Complainant, made June 20, 1906, and promulgated July 20, 1906, herein complained of, is void.

"Thereupon counsel for defendants filed their objections to complainant's said motion, and entered their motion in behalf of defendants, on the face of the pleadings and the written grounds set forth in their said motion, that the Court enter an order dismissing this action.

"And said motions having by agreement of counsel been set for hearing on this day, the same were fully argued by counsel for complainant and defendants, and the Court being fully advised, thereupon ordered, adjudged and decreed as follows:

"'1 That the said objections and motions of the defendants be and the same are overruled, and

the said motion of the complainant be and the same is sustained, the Court being of opinion that the act of the General Assembly of the Commonwealth of Kentucky, known as the McChord Act, approved March 10, 1900, and the order of the Railroad Commission of Kentucky promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory (upon which no decision is or can now be made), violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibit any State from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, and that said order of said Commission, so far as it is made applicable to complainant is, therefore, null and void, and the Special Commissioner is directed so to report herein.

2. Thereupon counsel for complainants and defendants stipulated and agreed that the said report of the Commissioner shall be and it now is treated and considered as filed in the terms above prescribed. And thereupon this cause was submitted for a final decree, and the Court being further advised, ordered, adjudged and decreed that the preliminary injunction heretofore granted herein be and the same is made perpetual, and the defendants, Adam T. Siler, McDougall Ferguson and Lew P. Tarlton, individually, and as constituting the Railroad Commission of Kentucky, their successors in office, and said Commission be and they are hereby perpetually enjoined and restrained from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, herein complained of, or putting the same into force or effect, and from enforcing or attempting to enforce the same, so far as it is made

applicable to complainant, or so far as it relates to the lines of railroad owned or operated by complainant in the State of Kentucky, and from recommending or procuring indictments against complainant or any of its officers, agents or employees, to recover any fine or penalty for any violation of said order or for charging, collecting or receiving any rate or rates in excess of those prescribed by said order; and said defendants are further enjoined to revoke and cancel said order so far as it prescribes or attempts to prescribe for complaintant a schedule of maximum rates styled 'Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1,' applicable to the Southern Railway Company in Kentucky.

3. It is further ordered, adjudged and decreed by the Court that the question of costs is not now determined, but either party may, after the final determination of this cause in the Supreme Court of the United States, move for an order in regard thereto at the foot of the decree.

4. And then came defendants and in open Court prayed and were allowed an appeal from this decree to the Supreme Court of the United States.

" 'Defendants shall execute a bond in the penalty of five hundred dollars without surety, conditioned to prosecute said appeal, and shall file herein their assignment of errors—all within sixty days from the entry of this decree. No citation need be issued, the appeal being granted in open Court and complainant being present.' "

From these decrees appeals were prayed and taken to this Court and, for reversal thereof, the following are the

ERRORS ASSIGNED.

1. The Circuit Court of the United States for the Eastern District of Kentucky erred in holding and deciding that said Court was bound by and should follow the decision of the United States Circuit Court for the District of Kentucky in the case of Louisville & Nashville Railroad Company vs. McChord, *et al.*, as reported in 103 Fed. 216, and in its interpretation of the opinion in McChord, *et al.*, vs. Louisville & Nashville Railroad Company, reported in 183 U. S. 483, reversing said former decree.

2. That said Court erred in holding that it had jurisdiction of these defendants upon the subject matter set forth in the bills of complaint, since the allegations of said bills are that these defendants had not been vested with the power by either the Constitution of the State of Kentucky or by any Act of its Legislature or by any law to make and enter the order of July 20, 1906, herein complained of.

3. That said Court erred in rendering judgment against these defendants upon the pleadings in said cause; said judgment is contrary to law and the facts as presented by said pleadings.

4. That said Court erred in holding that the Act of the General Assembly of the Commonwealth of Kentucky, approved March 10, 1900, and the order of the Railroad Commission of Kentucky, promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory, violate the provisions of section one of the Fourteenth Amendment of the Constitution of the United States which prohibits any State from depriving any person of property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws, and in holding

that said order of said Commission, as far as it is made applicable to complainant, is either null or void, and in directing that the Special Commissioner so report.

5. That said Court erred in rendering a perpetual order of injunction against these defendants and their successors in office and said Commission, enjoining and restraining them from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, and from putting the same into force or effect, and from enforcing or attempting to enforce the same as far as it is made applicable to complainant or as relates to the lines of railroad owned or operated by complainant in the State of Kentucky.

6. That the said Court erred in adjudging that these defendants be further enjoined to revoke and cancel said order as far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," applicable to complainant and its said line of railroad in Kentucky.

7. That said Court erred in overruling defendants' objections to complainant's motion and grounds of motion upon which motion and grounds the decree herein was rendered; and in overruling defendants' motion that on the face of the pleadings an order be entered dismissing this action; and said Court further erred in sustaining complainant's said motion and grounds of motion, as follows:

(a) That said Act of March 10, 1900, undertakes to vest in said Commission Legislative, Executive and Judicial powers in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, and that said Act is, therefore, unconstitutional, null and void.

(b) That because said Act does not provide for an appeal to a Court from the final order of said Com-

mission nor for any judicial investigation, or judicial review, of the question of reasonableness of any rate fixed by said Commission for services thereafter to be rendered before it is required to put same into force and effect, such order deprives the carrier of its property without due process of law and denies to it the equal protection of the laws in violation of section one of the Fourteenth Amendment of the Constitution of the United States.

(c) That the penalties imposed by said Act are so enormous as to render the Act on its face violative of the provisions of section one of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws; and

(d) That said Act is unconstitutional and void because it undertakes to vest in said Commission the judicial powers of adjudging a carrier guilty of extortion before fixing a rate which the carrier may charge and without affording an opportunity to be heard in any court, and thereby deprives the carrier of its property without due process of law, and denies to it the equal protection of the law guaranteed by the provisions of section one of the Fourteenth Amendment of the Constitution of the United States; and

(e) That said Act undertakes to impair the obligation of an existing contract between complainant and the State of Kentucky in violation of sub-section one, section ten, article one of the Constitution of the United States; and

(f) That said Commission was not authorized or empowered to prescribe and establish schedules of maximum rates; and

(g) That the allegations of the complaints on which the order complained of was made were insufficient to make said order; and

(h) That said Commission had no power to forbid complainant from charging or receiving rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances than those shown in said Commission's Standard Tariff No. 1; and

(i) That said Kentucky Railroad Commission's Standard Tariff No. 1 was arbitrarily made applicable to complainant and was not made applicable for the same distances and on the same classes of freight to all other railroad companies operating lines in Kentucky, and on that account that said order is unfair, discriminating and amounts to denial to complainants of the equal protection of the laws, in violation of section one of the Fourteenth Amendment of the Constitution of the United States.

In the course of argument we shall refer to the decree herein appealed from and that rendered by the Circuit Court of the District of Kentucky in the case of Louisville & Nashville Railroad Company, &c., vs. McChord, &c., 103 Fed. 206, as one decree, inasmuch as the former adopts the latter as the law of these cases; and, as the latter was rendered by Judge Walter Evans and the former by Judge A. M. J. Cochran, whenever we may have occasion to refer to either separately, we shall for convenience designate the one as Judge Cochran's decision and the other as Judge Evans' decision, and in referring to the pages of the printed record such reference will be to that of the Louisville Company, as all questions raised in the other cases are also involved in that of the Louisville case; and in discussing the questions involved in all the cases we shall take them up in the order as stated in the assignment of errors in the Louisville case.

ARGUMENT.

These cases possess at least one virtue—there has been no clash of State and Federal authority as to jur-

isdiction, and we feel that the record shows conclusively that there has been no hasty or radical action on the part of the Kentucky Railroad Commission. While every point has been strongly contested, all parties recognize that it is to the best interest of the people and of the railroads of Kentucky that the objections urged against the validity of the laws in question, and of the powers and duties of the Railroad Commission of Kentucky thereunder, be finally and fully determined.

We disclaim any purpose of questioning the jurisdiction of the Court to restrain the enforcement, against railroads, of tariff rates that are unreasonable where such rates are alleged to have been made under *authority conferred by a State law.* By the repeated adjudications of this Court it is held that unreasonably low rates operate to deprive the railroad of its property and, to that extent, of its property without due process of law, and that where such rates deny to the railroad a reasonable return upon its investment, when considered with respect to the paramount right of the public to enjoy reasonable transportation facilities and charges, there is a denial to the railroad of the equal protection of the law guaranteed by the Fourteenth Amendment to the Federal Constitution, and, therefore, a Federal Court has original jurisdiction.

Appellants have not now nor have they ever had a preference as to whether these questions shall be determined by the State Court or by the Federal Court. The question of jurisdiction as regards the Louisville Company and the Southern Company was raised for the sole reason that in our opinion the former company in Paragraph 20 of its bill and the latter company in Paragraph 10 of its bill, by alleging that "no power or authority had been vested in, or conferred upon, the appellants by the Act of March 10, 1900, or by any other law, to make the

order fixing rates complained of," struck from under these two cases every vestige of foundation for the claim of Federal Court jurisdiction. This averment not only negatives the idea that what the Railroad Commission of Kentucky did was the action of the State, but the bills of both companies expressly aver that there was no State authority behind the action of the Commission, thereby depriving the Federal Court of all jurisdiction of these bills as a suit arising under the Constitution or the laws of the United States.

In City of Louisville vs. Cumberland Telegraph Company, U. S. Circuit Court of Appeals, 155 Fed. 729, the Court said:

> "There was no jurisdiction by reason of diversity of citizenship; the complainant being a business corporation created under the laws of Kentucky, and the defendant a municipal corporation of the same State. Jurisdiction was invoked upon the contention that this is a suit arising under the Constitution or laws of the United States. That the bill does aver that the ordinance impairs the obligation of a contract and is also an attempt to deprive complainant of its property without due process of law is plain enough. But the constitutional prohibitions which are invoked run against the State, and the State alone, while the bill of the complainant in plain words negatives State action by averring that 'no power to regulate the rates charged by your orator or other telephone companies' has been granted 'by the Constitution or the Legislature of the State of Kentucky, or in any other way,' and that the enactment of said ordinance was and is beyond the power of the common council of said city, and the said

'ordinance void and an assumption of power and authority upon the part of the said common council unwarranted and unfounded." (citing many authorities.)

In Barney vs. City of New York, 193 U. S. 437, this Court said:

"Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the 14th Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.

"Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the State. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the State courts to remedy acts of State officers done without the authority of, or contrary to, State law. Missouri vs. Dockery, 191 U. S. 165, ante, 133, 24 Sup. Court Rep. 53; Civil Rights Cases 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Court Rep. 18; Virginia vs. Rives, 100 U. S. 313, 25 L. Ed. 667." See also 132 Fed. 901, 138 Fed. 184 and 209.

It may be argued that before the entry of the final decree herein appellees amended their bills of complaint and cured the defect of their original bills in this respect. We, however, find nowhere in these amended bills any such allegation as to State authority having been conferred upon the Commission as good pleading would require.

It was urged in argument, and Judge Cochran so held, that the case of Raymond vs. Chicago Union Trust Company, 207 U. S. 20, is decisive of the question of jurisdiction. We contend that this latter case has no application to the point we urge, as in the very opening sentence of Justice Peckham's decision in that case it is said:

> "The claim that the action of the State Board of Equalization in making the assessment under consideration was the action of the State, and if carried out would violate the provisions of the 14th Amendment of the Constitution of the United States, by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a Federal question beyond all controversy."

Thus, it will be seen that in the Raymond case the claim was made, and was properly pleaded, that the action of the State Board of Equalization was the action of the State and that the authority of the State was behind the action of that Board, whereas in the case at bar it is expressly averred that the action of the Railroad Commission in making and entering its order fixing rates was not authorized by any law of the State of Kentucky.

JUDICIAL POWER.

The first, second and fourth objections to the validity of the Act of March 10, 1900, raised by appellee's motion upon which Judge Cochran's decision was rendered, may be discussed under the general heading of judicial power. In holding that he was bound by the decision of Judge Evans, 103 Fed. 216, Judge Cochran concurred in the

conclusions reached by Judge Evans only to the extent that the Act of March 10, 1900, is invalid, and in violation of the 14th Amendment of the Federal Constitution. Appellees' contention is that the Act of March 10, 1900, is invalid because:

1. The Act vests in the Railroad Commission legislative, executive and judicial powers in violation of Sections 27, 28, 109 and 135 of the Constitution of Kentucky.

2. The Act fails to provide for an appeal to the Court from a final order of the Commission and fails to provide for any judicial investigation or judicial review of the question of the reasonableness of rates fixed by the Commission.

3. The Act vests in the Commission the power of adjudging the carrier guilty of extortion in advance of the fixing of just and reasonable rates.

The Railroad Commission is a constitutional body, the scope of whose duties is not fully set out in terms in the Constitution of Kentucky except that Section 209 of that instrument provides that:

"The powers and duties of the Railroad Commissioners shall be regulated by law and until otherwise provided by law the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation as now conferred, prescribed and allowed by law to the existing Railroad Commissioners." And while indeed the Constitution does delegate to the Legislature the power from time to time to confer additional powers and duties upon the Commission, it is nevertheless true that by Section 209 of that instrument all the laws of Kentucky then existing, defining the powers an duties of the Railroad Commission were read into the Constitution to remain as the law governing the

powers and duties of that body until otherwise changed and further defined by the Legislature.

The Constitution did not declare directly, or by indirection, the Commission to be (a) legislative, (b) executive, or (c) judicial, (Constitution 27); nor did it declare the Commission to be one "of those departments." (Constitution 28.)

The Constitution did not empower nor did it attempt to empower the Railroad Commission to usurp the powers or duties of either the judicial or executive departments of the State government. Undoubtedly the Legislature of Kentucky may empower the Railroad Commission, not to usurp, but to aid in the work of the departments of the State government without in any manner contravening Sections 27 and 28 of its Constitution. A Commissioner in Chancery may aid in the work of the judiciary; any one of the sundry legislative committees may aid in the work of the General Assembly; the militia may aid in the execution of the laws of the Commonwealth; and yet neither of them can be said to be usurping or exercising the functions of any of the coordinate branches or departments of the Government.

With respect to the Act of March 10, 1900, and the general duties and powers of the Railroad Commission, this Court in the case of L. & N. R. R. Co. vs. Commonwealth of Kentucky, 183 U. S. 505, said:

> "The occasion of the passage of this Act of March 10, 1900, was a decision of the Court of Appeals of Kentucky holding that Section 816, which declared that any company which should charge and collect more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in that State was guilty of extortion, could

not be enforced as a penal statute for want of certainty. Louisville & Nashville R. R. Co. vs. Com. 99 Ky., 132, 33 L. R. A. 209, 35 S. W. 129.

"The effort was made in the Circuit Court of the United States, and successfully, to have it held that by the said Act of March 10, 1900, Sec. 819, in so far as it provided an action by way of information, and to liability in damages, and that indictments should be made only on the recommendation or request of the Railroad Commission, was repealed by necessary implication; and that, accordingly, the order of the Commission, fixing the rate, toll, or compensation they may charge, was self-executing, and that no duty to enforce it was imposed on the Commission; that the railroad companies were shut out by the act to the final determination of the Commission that they have charged more than a just and reasonable rate; that on the trial of indictments for failure to observe the rates made by the Commission, the courts cannot entertain any inquiry as to the reasonableness of rates so fixed, because such inquiry is unwarranted by the statute, and, therefore, illusory and worthless; and that, even if the question of constitutionality could be raised in defense, yet that, if the order of the Commission were permitted to be entered of record, the companies, if they did not comply, would be at once exposed to innumerable prosecutions and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute was upheld.

"It was, however, held by this Court (McChord vs. L. & N., 183 U. S. 483), that it was not the intent

or effect of the Act of March 10, 1900, to repeal those provisions of Sec. 819 requiring indictments to be found only on the recommendation of the Commission, nor to circumscribe, in this particular, the general duty of the Commission to see that the law relating to railroads should be faithfully executed. This view of the meaning and effect of the legislation was that taken by the Court of Appeals of Kentucky in the case of Illinois C. R. Co. vs. Com., decided while the appeals from the decrees of the Circuit Court of the United States were pending in this Court * * *

"As we understand the condition of the statutes of Kentucky, there was at the time when this case was tried in the Circuit Court of Marion county, and when the Court of Appeals disposed of it, no power in the Railroad Commission to fix or establish rates or tolls which the railroad companies were bound to accept. Such power, however, was given to the Commission by the Act of March 10, 1900; and it was to restrain the Railroad Commission from taking action under that Act that bills of equity were filed by the Louisville & Nashville Railroad Company and other railroad companies in the Circuit Court of the United States * * *

"It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a Railroad

Commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.

"When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds, and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that in a given case a railroad company may be able to show that the State has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the States. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. But apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business wholly within a State, we are unable to see how such a company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the State.

"It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the State, yet that their ownership of such roads is property, and, as such, is protected from arbitrary interference by the State. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the State. We do not wish to be understood as intimating

that if, hereafter, the Railroad Commission should fix and establish rates of a confiscatory character, the company would be without the protection which courts of equity have heretofore given in cases of that description. What we now say is that a State corporation voluntarily formed cannot exempt itself from the control reserved to itself by the State by its Constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal courts, in respect to the long and short haul clause, in the State Constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another; and the remedy adopted by the State was to declare such preference illegal, and to prohibit any person, corporation, or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the State desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands."

The statute sought to be condemned clothes the Commission with the power of establishing *just and reasonable rates*, a function which it can no longer be doubted may be conferred by the Legislature, whether empowered by the Constitution of the State or not. This power when conferred is in nature rather an adjunct to the legislative, rather than the judicial power, and such duties can be performed without even a formal investigation of the reasonableness of pre-existing rates.

The statute in question, however, is fairer than this assumption, for it does provide that any rates established shall be done only after a full investigation and hearing by the Commission.

The Commission and its members do not render a judicial decree nor does the spirit of the Act contemplate such decree. They are required to hold an investigation after due notice, at which investigation full opportunity for a thorough presentation of all facts affecting the reasonableness of rates is given, not merely at the will of the Commission, but at the demand of the Legislature, and it is only when such hearing convinces the mind of the inquiring body (i. e. the Commission), not in the nature of a decree, but in the nature of an argument *ad hominem et ad mentem*, that unjust rates exist, that there follows any declaration of a new rate by the Commission.

Any legislative body before altering the existing conditions must, in reason, in some way become convinced of the wisdom or necessity of such legislation. Its knowledge may be acquired by the privately acquired knowledge and experience of its members, or by a legislative investigation, resembling that demanded of the Commission. When once it has acted, the means of its acquisition of knowledge is not a question for complaint; if a wrong is done, it is the new enactment flowing from that knowledge; and the new enactment must be the subject of the complaint. Under the statute the Legis-

lature demands an investigation as preliminary to action by the Commission; it may not act until its investigation convinces it of the existence of an unfair rate. The exercise of the so-called judicial powers—its ascertainment that an existing rate is unreasonable—is without any effect and can grieve no railroad. The only complaint that a carrier can have is that which may flow from the making of a new rate—not from a condemnation of the old rate.

Yet we find the appellees urging as a grievance and as an objection to the validity of these laws, that the Commission is required by the statute to exercise its judgment before acting; that it must give the carrier a hearing; that it is absolutely restrained from sudden, ill-advised or *ex parte* action.

The making of rates is essentially a legislative function or act.

"To prescribe rates which shall be charged in the future is a legislative act." (Interstate Commerce Commission vs. C. N. O. & T. P. R'y Co., 167 U. S. 479) and sundry cases there cited sustaining this principle.

See also McChord, &c., vs. L. & N. R. R. Co., 183 U. S. 483.

There can be no question of the right of the Commonwealth to delegate this legislative function to a Commission. The Constitution provides that the Legislature may prescribe the duties of the Commission. Further, the Supreme Court, in the case of Reagan vs. Farmers L. & T. Co., 154 U. S., at pages 393-4, said:

> "There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroads and other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the State

for carrying into effect the will of the State as expressed by its legislation. No valid objection, therefore, can be made on account of the general features of this act; those by which the State has created the Railroad Commission and entrusted it with the duty of prescribing rates or fares and freights as well as other regulations for the management of the railroads of the State."

Also in the case of Alt. C. L. R. vs. North Carolina Corp. Com., 206 U. S. 20:

> "The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

This doctrine has been upheld in all subsequent decisions of this Court and will not be seriously disputed.

Such methods of rate making is consonant with utility and justice alike. It selects a body of skilled officials who may alter rates with altering conditions, rather than to commit them to iron-clad, direct legislative enactment; it permits the railroads and their representatives to have full discussion and hearing, and, if the Commission should err, the State and Federal Courts are at all times open with full power and jurisdiction to review the acts of the Commission as is now being done in the case at bar.

In the recent case of *ex parte* Young, April 15th, U. S. Advance Sheets, 456, the Court said:

"All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations, and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this Court. Chicago, M. & St. P. R. Co. vs. Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. Rep. 336. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

"We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (St. Louis & S. F. R. Co. vs. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. Rep. 484), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible. * * *

"All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question.

An act of the Legislature, fixing rates, either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary. Under such circumstances it was stated by Mr. Justice Miller in his concurring opinion in Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S. 418-460, 33 L. Ed.

970-982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702, that the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission is by a bill in chancery, asserting its unreasonable character; and that until the decree of the court in such equity suit was obtained, it was not competent for each individual having dealings with a carrier, or for the carrier in regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive manner. This remedy by bill in equity is referred to and approved by Mr. Justice Shiras, in delivering the opinion of the Court in St. Louis & S. F. R. Co. vs. Gill, 156 U. S. 649, 659, 666, 39 L. Ed. 567, 570, 573, 15 Sup. Ct. Rep. 484, although that question was not then directly before the Court. Such remedy is undoubtedly the most convenient, the most comprehensive, and the most orderly way in which the rights of all parties can be properly, fairly, and adequately passed upon. It cannot be to the real interest of anyone to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected. The question of sufficiency of rates is important and controlling; and, being of a judicial nature, it ought to be settled at the earliest moment by some court, and when a Federal Court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment, to the exclusion of all other courts. This is all that is claimed, and this, we think, must be admitted.

We submit, therefore, that appellee's contention is without merit, likewise the contention that the laws are invalid because no appeal is provided to a court from the final order of the Commission nor any judicial investigation or review of the question of the reasonableness of rates fixed by the Commission.

If this latter proposition is sound, then the complainant is endeavoring to have an adjudication in this action of a question which it confesses to be without the power of any court to hear. The principal relief sought is to have a finding by this Court that the rates complained of are confiscatory. The complainant first invokes the aid of this Court; it asks it to make a judicial investigation or review of the reasonableness of these rates; and at the same time asks the Court to say that it has no power to make such investigation. Perhaps a thousand pages of proof have been taken in these four cases, all addressed to the question of whether the Commission's rates are reasonable; and now the Court is asked to say that it has no power to consider such proof.

It will be borne in mind that actions of this nature are not actions against the State or sovereignty. "A suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State." (From Smyth vs. Ames, 169 U. S. 466, S. C. 42 L., Ed. 819.) Further, it will be remembered that the act in question (Ky. Stats. 820 A) requires that notice of the making of any rate shall be given the railroad affected; and that there shall be an interim of ten days before the rate becomes effective. Within this ten days, what relief has the railroad, if it considers itself aggrieved? It has the remedy and relief sought in these cases; it has the right to its injunction, and to judicially inquire as to whether the rates made are unconstitutional and confiscatory. The com-

plainant concedes as much by invoking such relief in this action. It is true that the statute in question makes no provision for such relief; it is equally true that it makes no effort to prohibit such relief, nor any declaration against it. Indeed, any such effort or declaration would be abortive. It has been so determined by this Court. In Smyth vs. Ames, *supra*, it said:

> "While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the Legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

And thereupon the Court entered into a consideration of the facts, in the effort to ascertain whether the Nebraska rates in question were unconstitutional. And, again, it will be recalled that proceedings against the Commission will suffice; for no penal action or indictment against a railroad company can be had for charging more than the rate fixed, save upon their initiative; as was held in the case of McChord, *et al.*, vs. the Louisville & Nashville R. R. Co., in 183 U. S. 483, S. C. 46 L. Ed. 289.

It is true that the case just cited concluded its opinion by remarking that it did not determine whether the enforcement of rates once fixed by the Commission could be restrained; but this Court in the case of the Louisville & Nashville Railroad Company vs. Commonwealth of Kentucky, 183 U. S. 503, *supra*, decided on the same day as the McChord case, used this significant language:

> "And, accordingly, if it appeared, in the present case, that the Railroad Commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for."

And again:

> "We do not wish to be understood as intimating that if, hereafter, the Railroad Commission should fix and establish rates of a confiscatory character, the company would be without the protection *which courts of equity have heretofore* given in cases of that description."

And in *ex parte* Young, this Court has decided unqualifiedly in favor of such relief.

But it may be urged that the remedy by injunction is a far-fetched, delicate, and indirect method of relief. Not so; for the Court of Appeals of Kentucky, in the case of Louisville & Nashville Railroad Co. vs. Commonwealth, 99 Ky. 132, cited with approval by the Supreme Court in the McChord case, *supra*, has pointed out that any other method than some such direct and independent method, would be wholly inefficient. The opinion declares that it is essential that there must be fixed some standard of rates, the exceeding of which would be criminal; and that it is impossible to let the criminality of the rate charged rest upon the many uncertain and complicated elements which would enter into a jury's determination of whether a rate were reasonable or confiscatory. It follows, therefore, that the expeditious remedy lies in a direct proceeding to ascertain, once for all, whether a rate fixed by the Commission is an unconstitutional rate; and we

insist that no remedy is so expeditious, holding all matters *in statu quo,* as is the remedy sought in this case —a restraining order, and a judicial inquiry.

We, therefore, submit that complainant is not without redress in the courts; that it can have a judicial inquiring into the reasonableness of rates fixed by the Commission before it incurs penalties or suffers punishment.

We dislike very much to cumber this brief with further discussion and citation of authorities upon this subject. These identical questions have been so frequently urged and elaborately argued before this Court, (and as often decided against the contention here made) that but for appellee's persistence in urging a contrary doctrine we would be content to rest the discussion at this point upon the authorities which we have already cited.

The contention that a judicial hearing is necessary to the fixing of rates or that there must be some provisions for judicial review after the rates have been fixed is based upon an erroneous interpretation of the opinion in the case of Railroad vs. Minnesota, 134 U. S. 418. We have never understood that the Minnesota case even remotely sanctioned any such doctrine.

Our interpretation of that case, and the cases which have followed it in this Court, including the very latest case of *ex parte* Young, *supra,* is that the fixing or making of rates is a legislative power, with which the courts have no concern, but that if rates are made which are unreasonable and unjust the protection afforded by the Fourteenth Amendment may be invoked. A rate unreasonable and unfair to a railroad comes, therefore, within the power of the judiciary whose peculiar function it is to protect property rights against such invasion. The doctrine of that case is that the courts do not concern themselves with the future regarding the rate, and will

not, and have no power to, fix or make a rate, but that the reasonableness and fairness of a rate which has been made is the subject of a judicial investigation. The legislative department can not, by labeling a rate as fair and reasonable, deprive the court of the power of investigating the subject, and determining, for itself, that question. This is very far from reaching the contention of the complainants that a judicial investigation must precede the fixing of a rate. The doctrine of that case, as we understand it, is simply that the Legislature has not the power to deprive the courts of an investigation, and that after a rate has been fixed, the court may be appealed to and a trial may be had to determine its reasonableness, and a law which denies to a person the constitutional right to appeal to a court for such an investigation is, to that extent, unconstitutional and void. That case does not decide that, although the act may attempt to prevent such an investigation, if the courts of the State assume an investigation, the act would be declared void; but, on the contrary, it only holds that, where the courts of the State interpret the law and refuse to assert jurisdiction to investigate the reasonableness of a rate made, the Federal judiciary, on writ of error, will restrain the enforcement of the act as to the rate. In that case, a law of the State of Minnesota provided that all charges made by common carriers should be equal and reasonable, and all unequal and unreasonable charges were prohibited and declared to be unlawful, and, further, that each common carrier should print for public inspection a schedule of the charges, which it had established, no more nor less than which schedule it should charge, and that this schedule could be changed only upon ten days' notice; and that it should also file copies of its schedules with the Commission and should notify the Commission of all changes, and that the Commission should have the power, at any time, to change any part of the tariff or charges,

so filed or published, found by it to be in any way unequal or unreasonable, and in such case should make, for the carrier, what it deemed to be a just and reasonable rate, and that this rate should be adopted, by the carrier, and no more and no less charged, and upon the failure of the carrier to put into force such a rate, it should be subject to a writ of mandamus, to be issued by any judge of the Supreme Court, or of any district court, upon application of the Commission, to compel compliance with the requirements of the act. The Commission fixed a rate for the Chicago, Milwaukee & St. Paul Railway Company, the plaintiff in error, touching its milk traffic between certain points, and upon its refusal to adopt the rate an action for a writ of mandamus was brought under the provisions of the act. In answer to the petition for the writ, the railroad responded, among other things, that the rate which the Commission had fixed was unreasonable and amounted to a taking of its property without due process of law, and a violation of the guaranties of the Fourteenth Amendment. It was adjudged by the Supreme Court of the State (38 Minn. 281), that the answer was insufficient; that the reasonableness of the rate was the subject of legislative, and not of judicial, investigation, and that the Court had no power to go behind the finding of the Commission. Upon writ of error to this Court, it was held, Messrs. Justice Bradley, Gray and Lamar dissenting, that the question as to whether the rate was, or was not, reasonable was a judicial question, after the rate had been fixed, and that to deny such an investigation and enforce against a railroad an unreasonable rate, was a violation of the guaranties of the Fourteenth Amendment. It was not, however, ruled nor, as we read the case, even intimated in any of the opinions, that the act was objectionable because it did not expressly provide for a judicial hearing, after the rate was fixed. On the contrary, the contention made in that

case was that, under the act, what was tantamount to a judicial hearing, was held by the Commission before the rate was fixed, and that this was sufficient; but in answer to that contention this Court held that the Commission was an administrative board, and not a court, and that the provision for hearing, before the Commission, with reference to the fixing of a rate, was not equal to a judicial investigation as to the reasonableness of the rate, after it had been fixed. Nor did this Court, in that case, interpret the Minnesota statute as denying, or intending to deny, a judicial hearing. On the contrary, in remanding the case, this Court was careful to say that if the Supreme Court of the State would set aside its ruling and admit the answer of the railroad, and afford it a judicial investigation as to the reasonableness of the rate, the mandate of the Court would be complied with The language of the opinion of Mr. Justice Blatchford, speaking for the majority, is:

> "In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceedings for a mandamus, if the court should adhere to its opinion that, under the statute, it can not investigate judicially the reasonableness of the rates fixed by the Commission. Still, the question will be open for review; and the judgment of this Court is, that the judgment of the Supreme Court of Minnesota, entered May, 4, 1888, awarding a peremptory writ of mandamus in this case, be reversed and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this Court."

Again, in speaking of the action of the State Court in refusing to hear the defense pleaded, Mr. Justice Blatchford said:

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter, in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission, which, in view of the powers conceded to it by the State Court, can not be regarded as clothed with judicial functions, or posessing the machinery of a court of justice."

Mr. Justice Miller, in a concurring opinion, set out his views in the form of ten propositions. The power of the legislature to exercise its function of fixing a rate, through a Commission, was conceded, in the first and second propositions, and the remainder of the opinion is as follows:

"3. Neither the Legislature, nor such Commission acting under the authority of the Legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the Legislature or by the Commission is such as to deprive a party of his property without due process of law.

"5. But until the judiciary has been appealed to, to declare the regulations made, whether by the

Legislature or by the Commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

"8. But in the present case, where an application is made to the Supreme Court of the State to compel the common carriers, namely the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the Commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission before granting such relief, that it would have if called upon so to do by a bill in chancery.

"9. I do not agree that it was necessary to the validity of the action of the Commission that previous notice should have been given to all common carriers interested in the rates to be established, nor

to any particular one of them, any more than it would have been necessary, which I think it is not, for the Legislature to have given notice if it had established such rates by legislative enactment.

"10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void."

This opinion of Mr. Justice Miller was quoted and approved by this Court, speaking through Mr. Justice Shiras in the case of St. Louis & San Francisco Railway vs. Gill, 156 U. S. 649, and again by Mr. Justice Peckham in *ex parte* Young, *supra.*

As we understand these propositions, it is established that a judicial hearing is not necessary to precede the fixing of a rate, and that, in fact, the rate can be fixed without any notice or hearing whatever. Nor is it intimated that the Act must expressly provide that a judicial hearing may be had after the rate is fixed. On the contrary, the courts have jurisdiction to grant this hearing by virtue of the Fourteenth Amendment and without any express grant of power by legislative act. It would result, therefore, that if nothing is said in the act, the courts of the State possessing equitable jurisdiction, like the Circuit Courts of the United States would have jurisdiction to

entertain a bill to restrain the Commission from the enforcement of an unreasonable rate and, in such action, to investigate the reasonableness of the rate that was being enforced. It is moreover established by the third proposition that the rights of the railroad and the public with reference to the rate are correlative, and that the rate must be reasonable and just to both; that the public has as much right to complain of an unreasonably high rate, as the railroad has of an unreasonably low rate. It is further established that the question of the reasonableness or unreasonableness of a rate can not arise until after the rate has been fixed. It then becomes, for the first time, a judicial question, to be determined by the courts. Mr. Justice Bradley dissented on the ground that the matter was wholly legislative, and that due process of law was satisfied in such matters, through legislative functions, and did not require the exercise of judicial functions, and that the courts were bound by the rate fixed. Mr. Justice Lamar and Mr. Juctice Gray concurred with Mr. Justice Bradley in this view. All of the opinions agree, that a judicial hearing is not necessary to the fixing of a rate.

In the case of Fitts vs. McGhee, 172 U. S. 516 it was held that a law of the State of Alabama fixing a toll rate for the Florence Bridge was not invalid or unconstitutional, and did not operate to confer even jurisdiction upon the Federal courts in advance of action in the State courts, because it provided for no judicial hearing as to the rates fixed by the act. In that case it was decided that the proper method of raising all defenses under the Fourteenth Amendment was by pleading, to indictments in the State courts or in the other penal actions that were brought, the unreasonableness of the rate, and that after testing the matters through the State court, a writ of error for review would lie from the Supreme Court of the United States; but that in advance of such procedure, although it might be convenient, no action in equity could be

brought in the Federal Circuit Court. That the courts do not exercise jurisdiction regarding the making of a rate, but only assume jurisdiction as to the reasonableness of a rate that has been fixed and complained of, is well established by the adjudications of this Court.

Smyth vs. Ames, 169 U. S. 466.
Reagan vs. Trust Company, 154 U. S. 362.
Lake Shore vs. Smith, 173 U S. 684.
Railroad vs. Gill, 156 U. S. 664.
Railroad vs. Wellman, 143 U. S. 339.
Railroad vs. Blake, 94 U. S. 180.
Munn vs. Illinois, 94 U. S. 113.
Stone vs. Trust Company, 116 U. S. 307.

These authorities and subsequent authorities heretofore cited all establish the proposition that the fixing of a rate is not judicial, and that a court, even in passing upon the reasonableness of a rate fixed, will not assume jurisdiction to say what would be a reasonable rate. The extent of the judicial power is to decide whether or not a rate which has been fixed and is complained of is reasonable.

The case of Budd vs. New York, 143 U. S. 517, left a doubt as to whether there was some possible distinction between a rate fixed by the legislature and a rate fixed by a commission authorized by it, but this was soon dissipated and the doctrine, as now firmly established, is that there is no distinction.

Railroad vs. Gill, 156 U. S.
Reagan vs. Trust Company, 154 U. S.
Smyth vs. Ames, 169 U. S.
Lake Shore vs. Smith, 173 U. S. *supra.*

Thus, in the case of Chicago, Milwaukee & St. Paul Railway Company vs. Tompkins, 176 U. S. 167, court and

counsel assumed the existence of the power in the legislature to fix rates through a commission. Under the law the commission made a schedule of rates, and the bill seeking to enforce the schedule was immediately filed. The sole ground for relief was the unreasonableness of the rates fixed by the commission. There was no question raised as to the authority of the commission to act. It may fairly be concluded from this that the doctrine is firmly established that the power which the legislature has to fix the rates for carriers may be exercised by it directly through an act, or indirectly through a commission created for the purpose.

As hereinbefore noted, in the case of Railroad vs. Wellman, 143 U. S., Mr. Justice Brewer, delivering the opinion of the Court, said:

> "The legislature has power to fix the rate for railroad charges for the transportation of passengers, and the extent of judicial interference is protection against unreasonable rates."

In Smyth vs. Ames, 169 U. S. 528, this Court, in an opinion delivered by Mr. Justice Harlan, said:

> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, can not be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

To the same effect see:

Reagan vs. Trust Company, 154 U. S. 362.
Railroad vs. Gill, 156 U. S. 664.
Railroad vs. Blake, 94 U. S. 180.
Munn vs. Illinois, 94 U. S. 113.
Lake Shore vs. Smith, 173 U. S. 684.
Stone vs. Trust Company, 116 U. S. 307.
Starrs vs. Railroad, 11 S. R. (Fla.) 226.
Georgia Railroad vs. Smith, 128 U. S. 174.
Dow vs. Beidelman, 125 U. S. 680.
Budd vs. New York, 134 U. S. 517.
Lexington Turnpike vs. Sandford, 164 U. S. 578.

In Railroad vs. Gill, 156 U. S. 648, on writ of error to the Supreme Court of the State of Arkansas, where the legislature fixed the rate, in speaking to the question of a judicial hearing on the rate fixed, this Court, in an opinion delivered by Mr. Justice Shiras, said:

> "Sometimes, in acting on this subject, the State legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill of equity, or some equivalent proceeding, wherein the rights of the public, as well as those of the company complaining, can be protected. But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves, establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and, therefore, if the companies are to have any relief, it must be found

in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

In that case the act did not provide for any judicial hearing. The railroad answered, alleging special facts, which it claimed operated to show that the rate fixed was unreasonable. A demurrer to this was sustained by the State court, and the railroad afterward offered to prove special facts to the same purport, but to which an objection was sustained. It did not thus appear that the State court had refused to receive a competent answer, or competent proof, going to sustain the defense of unreasonableness of rate, yet this Court did not hold that such action by State authorities was a denial of a judicial hearing. On the contrary, this Court held that neither the answer nor the proof offered to show that the rate was unreasonable, and concluded as follows:

> "Upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the Legislature of Arkansas, which, on its face, appears to be a legitimate exercise of power, and which has not been shown, by clear and satisfactory evidence, to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error."

In the case of Stone vs. Trust Company, 116 U. S. 307, known as the Mississippi Railway Commission Cases, this Court held that in the absence of a direct provision in the statute invading some constitutional right or privilege, the court would presume that the State authorities would obey the law, and would give the act such operation as would comply with constitutional limitations.

In Smyth vs. Ames, 169 U. S., followed by Higgin-

son vs. Railroad, 171 U. S. 361, and in Reagan vs. Trust Company, 154 U. S., this Court, in passing upon the reasonableness of a rate which has been fixed, limited its authority to pass upon the schedules of railroads as a whole, and so framed the decree as not to prevent the state, or its commission, from fixing or making other rates, or from making rates as to particular items.

In Railroad vs. Nebraska, 170 U. S. 57, in regard to apportioning against railroads the costs of constructing and maintaining a railroad crossing, where it was claimed that the apportionment was invalid because made without notice, this Court, in an opinion delivered by Mr. Justice Shiras, said:

> "Again, it is said that the apportionment made by the ordinance of the extent of the repairs, one-third to the plaintiff in error and two-thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality. But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make a due apportionment through the instrumentality of the city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion."

In support of this, the opinion cites and quotes from the cases of:

State vs. Railroad, 33 Kan. 176.
N. Y. Health Dept. vs. Trinity Church 145 N. Y. 32.

In San Diego Company vs. National City, 174 U. S. 740, it was contended that the state laws authorizing water rates to be established without previous notice to

the corporation or persons immediately interested and without hearing, in any form, was invalid, because repugnant to the Fourteenth Amendment of the Federal Constitution, and reliance for this position was mainly put upon the case of:

Railroad vs. Minnesota, 134 U. S.

In that case the law provided the time when the rate should be fixed. It was held in that case (Mr. Justice Harlan delivering the opinion of the court), that a hearing was not essential, but that as the statute fixed the entire month of February in each year as the time when the rates should be fixed by the municipal authorities, it was the duty of the water company to make its complaint, and that this was sufficient notice. In treating of this subject, the opinion says:

> "If the state, by its constitution or laws, has forbidden the city or its board to receive or consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen."

In that case, in the Federal Court, the rate that was fixed was impugned. On this subject this Court said, at the conclusion of the opinion:

> "It is sufficient to say that upon careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety—and we can not properly look at them in any other light—are such as amount to a taking of property without just compensation, and, therefore, to a deprivation of property without due process of law."

In the case at bar the act does not preclude the complainants from being heard with reference to any rate that is to be fixed. On the contrary, it provides expressly that the railroad, whose rate is being considered, shall be notified and heard and each of the bills concede that there was notice and full hearing before the order was made.

See notices, pages 113-14-15-16 and 119 printed record.

In Railroad vs. Bristol, 151 U. S. 556, this Court held that it could not proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved. The contention, however, of the complainants is that there is some natural right to a judicial hearing with reference to the fixing of a rate.

In Reagan vs. Trust Company, 154 U. S. 395, this Court said:

> "Courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carrier and the shippers; they do not engage in any mere administrative work."

Again, on page 400, it was said:

> "As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule, or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi-legislation. If a law be adjudged in-

valid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this."

Again, in that opinion, it was held that the object of the legislature was the creation of a commission with power to fix rates, and that this was accomplished, whether the rates fixed were held conclusive or only *prima facie;* that the provisions with reference to the penalty complained of as rendering the act unconstitutional might be dropped from the statute without affecting the validity of the remaining portions.

It is further contended by the complainants that the Act of March 10, 1900, in not providing expressly that the reasonableness of the rate fixed may be made the basis of a defense, to any indictment or proceeding had under the statute, virtually provides that the rate fixed shall be conclusive, and shall not be inquired into. As we have before seen, however, such a presumption, rendering the statute unconstitutional, will not be indulged. The statute does not so provide. It was not necessary that the statute should contain any provision on this subject. Its silence leaves the matter open to the full operation, through the judiciary, of all of the constitutional provisions, if the Commission, in fixing the rate, should attempt their violation. In the absence of a direct provision that the rate fixed shall be conclusive and binding and not inquired into, the rate itself is *prima facie* evidence of its reasonableness. This much is indulged, out of that respect which one department of the government bears toward a co-ordinate department. If the act in question had, therefore, expressly provided that the rate, when fixed, should be only *prima facie* evidence of its reasonableness, there would be no ground

for this contention, on the part of the complainants, yet, as we think, the absence of any statement on the subject has this operation and effect.

See Tiedeman on State and Federal Control of Persons and Property, Volume I, page 313, and cases above cited.

Again, it is contended, and was so ruled by the Circuit Court, Judge Evans, that the Act of March 10, 1900, confers upon the Railroad Commission judicial powers; that the Commission first organizes as a court of justice, tries the railroad on a charge of extortion, and, if it should find the railroad guilty, *inflicts, as a penalty, its judgment making a reasonable rate*—in the language of the opinion of the Circuit Court, 203 Fed. 216:

> "The Legislature may delegate to a Commission power to establish rates generally, but not the power to try an individual railroad for an offense and lower its rates alone, as the penalty of such conviction. The most prominent feature of this legislation is the manifest purpose, if possible, to regulate rates by severe punishment for single offenses, rather than by means of real attempts to solve the immense problem of fair and reasonable freight and passenger charges by industrious and earnest efforts to ascertain what they should be."

It would seem from the opinion that the objectionable feature of the act is that it requires the Commission to investigate the matter of rates before it fixes a rate, a commendable feature, at least, in both a legislative and administrative board, as shown by all the decisions. On the one hand, the contention seems to be that the act is void because it does not give a judicial hearing and notice in the fixing of a rate; and, on the other hand, that it is void because a hearing and investigation does precede

the fixing of a rate. It is not true that only judicial bodies exercise the power of investigation and judgment. All legislation involves these functions and many executive, and even ministerial, acts require them. Any trial or investigation that precedes the making of a rate can not be a judicial investigation, within the meaning of the law, because it is an investigation looking not to an effect upon the past, but to the making of a rule for future conduct. Without re-iteration, this distinction is established in all of the cases, many of which have heretofore been cited.

In the case of Western Union vs. Myatt, 98 Fed. 341, the rate act of Kansas was held to invade the Constitution, because it conferred upon the Court of Visitation, created by the act, as a judicial body, legislative functions. In that case the Court, in defining this distinction, said, on page 341:

> "In prescribing regulations or rules of action under the police power of the State for the safety and covenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial function is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely defined therein. When the Legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then, whether its action is violative of some Constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of ju-

dicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the power of the State to fix or limit the charges of telegraph companies for transmission and delivery of telegraphic messages, is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law, and a denial of the equal protection of the laws, and, therefore, violative of the first section of the Fourteenth Amendment to the Constitution, is a question for the courts."

And again, on page 345:

"It was argued, at the bar, on behalf of the defendants, that the powers conferred upon the Court of Visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled that such contention was made with reference to Paragraphs 8 and 9 of Section 8 of the act, which authorize the court of visitation to 'prescribe rules concerning the movements of trains, to secure the safety of employes and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons.' Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and

opinions of men having special knowledge of matters to be effected by proposed legislation constitute, in any sense, the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act, requiring judgment and discretion, a judicial act."

To the same effect was the subsequent decision of the Supreme Court of Kansas upon the same subject, in State vs. Johnson, 60 Pac. 1068. In that case, Mr. Justice Johnson, in an able dissenting opinion, reviewing a great many authorities, held that the Kansas act did not create what is called the Court of Visitation, a judicial court, but made it only an administrative body, with quasi-judicial power, pertinent to confer upon such a body. Whatever may be said of the conflicting opinions regarding that statute, and as to whether judicial power was or was not conferred upon the board, it is sufficient to say that it radically differs from the statute now in question. Under the Kansas act, the board was, in every essential feature, constituted as a court with power to enter judgments, and to enforce its own judgments by sequestration of property and appointment of receivers.

In Railroad vs. Board of Commissioners, 78 Fed. 258, the Circuit Court, speaking through Mr. Justice McKenna, said:

"The objection that the provision of the California Constitution creating the Board of Railroad Commissioners is invalid, because they do not require notice to the railroads, is certainly doubtful as law, if it be not disputable as a correct interpretation of those provisions."

Then, after reviewing the Minnesota case in 134 U. S., and holding that the majority opinion in that decision does not warrant such an inference, and that the concurring opinion of Mr. Justice Miller holds expressly that notice is not necessary, it continues, on page 260:

> "These views seem to satisfy all the purposes of the State, and all the rights of the railroads. The Commission undoubtedly exercises a function which the Legislature would otherwise exercise. It should be as full with the Commission as with the Legislature, and, in both, subject to the same judicial investigation, as we have already seen it is, and thereby giving to the railroads that protection to their rights and property which the Constitution guarantees."

It was further held, in that case, in answer to the contention that the act was void because it did not provide for the fixing of reasonable rates, that in the absence of the word "reasonable," as a qualification of the rate to be fixed, the Court would infer that the Legislature intended reasonable rates.

In the case of Railroad Company vs. Trammel, 53 Fed. 197, where the State law provided that the rate fixed should be sufficient evidence of its reasonableness, when questioned, it was held that in advance of State decisions denying the complainant an investigation on this subject the Federal Court would not presume that the Legislature meant to prevent judicial investigation.

The Interstate Commerce Commission, under the Act of Congress of 1887, is vested with many functions more nearly approaching judicial functions than any possible legislative function of fixing a rate, and yet that body has been held not to be a court, and prior to the passage of the Hepburn bill, not to possess the legislative power of fixing a rate.

Railroad vs. Interstate Commerce Commission, 162 U. S. 184.

Interstate Commerce Commission vs. Railroad, 167 U. S. 507.

Interstate Commerce Commission vs. Railroad, 168 U. S. 144.

The investigation which the Kentucky Commission is to hold, under the Act of March 10, 1900, is for the purpose of informing itself, so that a just and reasonable rate may be made. It proceeds in the same manner that a legislative committee would in ascertaining the facts necessary to enable it to act intelligently. It is not for the purpose of entering a judgment convicting the railroad of extortion, and then fixing a rate as a penalty. The only penalty which it can inflict, by the terms of the act in question, is the fixing of *a reasonable rate*. Of this the railroad companies have no legal right to complain. The interpretation of the act sought seems to us to be unwarranted, at least, under every State statute, as well as under the Act of Congress, where a Railroad Commission is organized and invested with the power of enforcing, fixing or regulating rates, it is also invested with power to investigate and hear evidence, and to inform itself, and is generally required to do so. Under none of the cases is the Commission required to fix a rate simply for the purpose of fixing it. It will not be presumed that the Commission will attempt to enforce the law so as to destroy or cripple the company. Under most of the acts, where the act itself does not provide the rate, the Commission is not authorized to make the rate or change it, except when the railroad is violating the conditions of reasonableness and fairness, in the tariff which it exacts.

In the opinion of Interstate Commerce Commission vs. Railroad, 167 U. S. 493, Mr. Justice Brewer collated

the provisions of the acts of many of the States touching upon this subject.

In State vs. Wilson, 28 S. E. 554, it was held that the Railroad Commission, under the law of North Carolina, was not a court and did not have judicial powers, although the procedure much more nearly resembled a judicial procedure than that called for by the Kentucky act. In that case the Court said:

> "Our conclusion is that the Railroad Commission does not stand upon the same footing as the criminal courts, inasmuch as it is an administrative and not a judicial, court. While it was made by a subsequent statute a court of record, it was clearly the object of the act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers. It has been held to be a court of record in Atlantic Exp. Co. vs. Wilmington & W. R. Co., 111 N. C. 463, 474; 16 S. E. 394; but, in the opinion of the Court, delivered by Chief Justice Shepherd, appears the significant qualification: 'Whether a court, having no power to enforce its judgment, fulfills the definition of a court of record and of general jurisdiction, is unnecessary to be considered.' The Supreme Court of the United States, in Reagan vs. Trust Co., 154 U. S. 362, 397; 114 Sup. Ct. 1047, citing the Railroad Commissioner Cases, 116 U. S. 307; 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, says: 'There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroads or other carriers, and that this regulation can be carried on by means of a Commission. Such a Commission is merely an administrative board, created by the State for carrying into effect the will of the State, as expressed by its Legislature."

It is contended and intimated in the opinion that possibly the Act of March 10, 1900, was the result of, or influenced by, the decision of the Court of Appeals in Louisville & Nashville Railroad Company vs. Commonwealth, 99 Ky. 132, decided April 4, 1896. In that case the railroad was indicted and found guilty in the trial court of extortion, under Section 816 of the Kentucky Statutes, which reads as follows:

> "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion."

On appeal to the Court of Appeals, the judgment of conviction was set aside, and this section was held unconstitutional, because, in the opinion of the Court, until the State had fixed a reasonable rate, the railroad companies had no definite and certain standard according to which they could mould their conduct. It was held that while the common law and the statute fixed the rule at reasonableness, this was too indefinite and uncertain a rule to base a penal action upon—one jury might consider that reasonable which another jury might consider unreasonable.

The case of Railroad vs. Dey, 35 Fed. 866, decided by Mr. Justice Brewer, was referred to in the opinion as being similar to the case then before the court, except that in the Federal case a schedule of rates had been fixed as reasonable, thus giving a certain standard for the guidance of the railroads.

The Circuit Court, in the case at bar, intimates that

the Act of March 10, 1900, is obnoxious because it confers upon the Railroad Commission the power to fix the standard wanting in the section declared to be unconstitutional, and for this reason the act confuses judicial and legislative or administrative functions.

We confess that we are unable to reach this conclusion, even assuming the premises to be true.

It is again contended, and was held by the Circuit Court that the Act of March 10, 1900, violates Sections 27 and 28 of the State Constitution, which provides as follows:

> "Sec. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; those which are judicial, to another.
>
> "Sec. 28. No person, or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The Constitution also expressly provides for and creates the Railroad Commission, as shown by the section 209, *supra.*

Section 218 of the Constitution and Section 820 of the Kentucky Statutes, providing a penalty for charging a greater rate for a short haul than for a long haul, under certain conditions, gives to the Railroad Commission power to relieve the carrier from the operation of the section in special cases. This can only be done after a hearing and investigation, as extended and full as the Commission deem necessary. We have here, by Constitutional provision, so far as the State is concerned, a

delegation of power upon the Railroad Commission more nearly approaching judicial functions than any conferred by the Act of March 10, 1900. The provisions regarding the long and short haul were enforced by the Court of Appeals in the case of Louisville & Nashville R. R. Co. vs. Commonwealth, 46 S. W. 707, and affirmed by this Court in L. & N. vs. Kentucky, 183 U. S. 505.

As a Constitution can not be repugnant to its own provisions, it would seem that the Act of March 10, 1900, is not open to the objection that the Railroad Commission may discharge powers quasi-judicial in their nature.

Since Kentucky has existed as a State, county courts have discharged powers, both purely judicial and purely executive. Notwithstanding Section 28 of the Constitution the county court, *eo nomine*, is created by the Constitution, and is vested with a mixture of such powers.

See Pennington vs. Woolfolk, 79 Ky. 13.

In Stone, Auditor, vs. Wilson, 19 K. L. R. 126, overruling Commonwealth vs. Adams, 95 Ky. 589, it was held that a legislative act conferring upon the courts the authority to fix the fees to be received by certain executive officers, was not unconstitutional for the reason that it was an attempted delegation of legislative power to a judicial tribunal.

In Morton vs. Woodford, 99 Ky. 367, it was held that the delegation of power to a circuit court to establish towns under certain conditions is not a violation of the above provisions of the Constitution.

We, therefore, contend:

1. That the powers conferred upon the Railroad Commission by the Act of March 10, 1900, are purely legislative, or, at least, quasi-legislative, and that the nature of these powers is not changed because investigation and knowledge must precede their execution.

2. That it was not necessary, for the fixing of a rate or the discharge of any of the powers conferred under the act, that any notice should have been given to the railroads affected, but that the requirement of notice does not render the performance of the functions unconstitutional.

3. If notice be required to render the statute Constitutional, such notice is expressly provided by the act and was actually given. See notices pages 113-14-15-16-17 and 119 record.

4. A judicial hearing is not required by any provision of the Federal Constitution to precede or attend the making of a rate.

5. The absence of an express provision in the act that the rate, when fixed, shall not be conclusive, or that the party charged with an observance of the rate shall have the right to appeal to the courts for relief against an unreasonable rate, is immaterial, and does not render the act unconstitutional. The absence of such provision reads the Constitution into the law itself.

INTERSTATE COMMERCE.

It is claimed in the bills that the Act of March 10, 1900, is void, because it applies to and regulates interstate, as well as intra-state commerce, and so mixes the two that one can not be separated from the other, and thus the whole act must fall.

It is not claimed that the act expressly attempts to regulate interstate commerce, but it is contended that it has the result, because it does not expressly restrict its operation to intra-state commerce—that is, to such commerce as has its origin and destination wholly within the territorial limits of the State of Kentucky. The language of the act is:

"When complaint shall be made to the Railroad Commission accusing any railroad company or corporation, of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad, in this Commonwealth, or when said Commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission," etc.

Under well-recognized principles for the construction of a statute, and the hesitation which the judiciary always have in annulling a legislative act, we think that the act, upon its face, and with the light of other acts governing the Railroad Commission, should be construed as applying only to that subject matter over which the State has jurisdiction, to-wit: domestic commerce. Even if we were doubtful as to whether the legislative intent was to regulate interstate commerce, in advance of a determination by the State courts that it shall have such operation, the Federal judiciary will construe the act as applying only to domestic commerce. It must be presumed that the Legislature, even by the use of the most general terms, did not intend to exceed its jurisdiction. This Court said, more than thirty years ago, in Munn vs. Illinois, 94 U. S. 113, that, "every statute is presumed to be Constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

The functions of a Railroad Commission were deemed of sufficient importance by the people of Kentucky to provide therefor in the Constitution of the State, adopted September 28, 1891. (The sections referring thereto will be found in the appendix to this brief, as will,

also, the general provisions of the statutes governing the Commission.)

When the Act of March 10, 1900, is read in conjunction with Section 826, Kentucky Statutes, previously adopted, it is made patent that it was not intended by the later act to regulate the rates upon anything but domestic commerce.

Section 826 reads as follows:

> "Said Commission shall examine all through freight rates from points out of this State to points into this State; and whenever they find that a through rate charged into or out of this State is excessive or unreasonable or discriminating in its nature, they shall call the attention of the railroad officials in this State to the fact, and to urge them of the propriety of changing such rates. And when such rates are not changed, it shall be the duty of said Commission to present the facts to the Interstate Commerce Commission, and appeal to it for relief, and they shall receive upon application the services of the Attorney General of this State and into the condition, management and all other matters concerning the business of railroads in this State so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporations, their officers and employes, comply with the laws of the State; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violations."

By this section the duty of the Commission, in reference to interstate commerce, was very clearly pointed out. The Act of March 10, 1900, was not intended to repeal Section 826. They are not inconsistent, but may stand together, as the full expression of the Legislature's will as to the powers of the Commission in reference to both inter and intra-state commerce.

In McChord, &c., vs. L. & N. R. R. Co., 183 U. S. 483, this Court said:

> "Reading the various sections of the General Statutes of Kentucky, set forth in the statement preceding this opinion, as *in pari materia* with the Act of March 10, 1900, which should be done since they are parts of one system, having the same general objects in view, we think it apparent that the duty devolves on the Commission to enforce the rates it may fix under the latter act. By Section 816, extortion was defined to be charging more than a just and reasonable rate. Section 817 defined unjust discrimination, and Section 818 forbade undue or unreasonable preference.
>
> "Section 819 pronounced the same penalties on conviction of the offense of extortion, or of unjust discrimination, or of unreasonable preference, and provided for prosecution by indictment, or by action in the name of the Commonwealth, on information filed by the Board of Railroad Commissioners; that the railroad companies should be liable in damages to the party aggrieved; and also that prosecution by indictment should only be had on the recommendation or request of the Railroad Commission.
>
> "By Section 829 the Commission was empowered to hear and determine complaints under Sections eight hundred and sixteen, eight hundred and seven-

teen, and eight hundred and eighteen, and to enforce their awards in the courts.

"The duty was imposed on the Commission to initiate indictments under Section 820 for charging greater compensation, in the aggregate, for a shorter than for a longer haul.

"Section 821 made it the duty of the Commission to see that the laws relating to railroads should be faithfully executed, and to exercise a general supervision over the railroads of the State.

* * * * *

"The mischief to be cured in respect of extortion as defined by Section 816 was the want of certainty, and the remedy provided was the fixing of the rates by the Railroad Commission."

And again in L. & N. vs. Kentucky, 183 U. S. 505:

"The final contention, that Section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is, therefore, void, need not detain us long.

"It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulations to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.

"It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held

that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a State. (Erie R. R. Co. vs. Pennsylvania, 158 U. S. 431, 439; Henderson Bridge Co. vs. Kentucky, 166 U. S. 150.)

"A discussion of this subject will be found in the opinion of this Court in Louisville & Nashville R. R. Co. vs. Kentucky, (161 U. S. 701,) where the same conclusion was reached."

It has been repeatedly decided by this Court that unless the State statute, upon its face, expressly relates to interstate commerce, or unless it has received a construction from the highest court of the State applying it to interstate commerce, it will be construed as relating to domestic commerce.

In the case of Stone vs. Trust Company, 116 U. S. 307, it appeared that the commission law of Mississippi was much more indefinite than the Kentucky law. That law provided that any person or corporation engaged in transporting passengers or freight over any railroad in the State, which should exact, receive or demand more than the rate provided for by the bill should be guilty of extortion. In holding this act not to be a violation of the interstate commerce clause of the Federal Constitution, the Court said:

"It is not enough to prevent the State from acting, that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within.

"The Commission is not, in express terms, prohibited by the Act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one State to another. The statute makes no mention of persons or property taken up without the State and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the Commissioners is the constitutional authority of the State over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress and the general powers of the State in this particular is not everywhere distinctly marked; and it is always easier to determine, when a case arises, whether it falls on one side, or the other, than to settle, in advance, the boundary, so that it may be in all respects strictly accurate. As yet the Commissioners have done nothing. There is certainly much they may do in regulating charges within the State which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their Constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

The case of Wabash Road vs. Illinois, 118 U. S. 557, is very much in point as to the Federal interpretation of the Act of March 10, 1900, standing alone. In that case, the State statute provided that:

"If any railroad corporation shall charge, collect or receive for the transportation of any passenger or freight, of any description, upon its railroad, for any distance within the State, the same or a

> greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road. . . ''

it should be deemed and taken as *prima facie* evidence of an unjust discrimination, prohibited by the act and for which a penalty was imposed.

This act was interpreted, by the Supreme Court of the State, to prevent such discrimination, though the longer haul traversed parts of the same road through other State.

People vs. Railroad, 104 Ill. 476.

Railroad vs. People, 105 Ill. 236.

The State Court was reversed on writ of error. However, in passing upon the proper construction of that act, relieved of the State's interpretation of it, Mr. Justice Miller said:

> ''It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having, in that case, given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was made within the same State, we are bound, in this Court, to accept that construction.''

In a subsequent case before the Supreme Court of Illinois, Railroad vs. Jones, 149 Ill. 384, prosecuted upon the same statute, the contention was made that the statute was void, because of the decision in 118 U. S., *supra*. In passing upon this contention, the State Court calls

attention to the fact that in the judgment of the Federal Court, the act was void simply because of the interpretation placed upon it by the State judiciary, and then explains how the State Court was led into that interpretation by decisions leaving it to infer that the matter there involved was within the jurisdiction of the State in the absence of Congressional action upon the subject; and the Court then states that if the case then under investigation arose upon the same section of the statute it would be inclined to hold, in view of the decision of the Federal Supreme Court, that their previous decision was incorrect, and thus let the section stand as a valid and enforcible section, applicable alone to domestic commerce; but the Court was not compelled to this, because it held that the section involved in the 118 U. S. case could be eliminated from the statute and the remainder of it stand; and it then construes the other sections of the same act to apply alone to domestic commerce.

The presumption of the validity of a State act is always indulged. In fact, as often announced by this Court, the most delicate duty which the Court has to perform is to declare an act of a co-ordinate branch of the government to be unconstitutional. This will never be done, except in a plain and manifest case. Every inference and indulgence is to be made in favor of the Constitutionality of a legislative act. Remedial laws are always liberally construed to accomplish the purposes of the lawmakers. In reference to legislation, concerning rates, this Court has repeatedly said that it would not hold a rate, established either by the Legislature, or by a commission under its authority, to be in violation of the Fourteenth Federal Amendment, unless it was shown to the exclusion of a reasonable doubt that the rate so established operates to deprive the railroad of its property, or of the equal protection of the laws.

Smyth vs. Ames, 169 U. S. 466.
Reagan vs. Trust Company, 154 U. S. 362.
Railroad vs. Smith, 173 U. S. 684.
Railroad vs. Wellman, 143 U. S. 339.
Southern Pacific vs. Board of Railroad Com'rs, 78 Fed. 236.

In the late case of Railroad vs. Tompkins, 176 U. S. 173, Mr. Justice Brewer, speaking for the Court, said:

> "In approaching the consideration of a case of this kind, we start with the presumption that the act of the Legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the Constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company, or the legislation of the State must be upheld."

Mr. Endlich, in his work on Interpretation of Statutes, Section 169, states the rule thus:

> "Another general presumption is that the Legislature does not intend to exceed its jurisdiction. Primarily, the legislation of a country is territorial.
>
> The general rule is that *extra territorium jus dicenti impune non paretur*; *leges extra territorium non obligant*. . . . The presumption is that the Legislature does not design its statutes to operate on them, beyond the territorial limits of its jurisdiction. They are, therefore, to be read, usually, as if the words to that effect had been inserted in them."

A great number of decisions are cited to support the text.

We submit that on its face, and especially when construed *in pari materia* with the Railroad Commission

statute, which this Court in McChord, &c., vs. Louisville & Nashville R. Co., &c., 183 U. S. 483, says must be done, it was the intention of the Legislature to apply only to domestic or intra-state commerce, and that, even if there were a doubt upon the subject, that doubt must be resolved in favor of its Constitutionality, in advance of a State interpretation, and be made to apply only to that over which the State has a right of government.

The bills of complaint do not charge that there is not such commerce which would be the legitimate subject matter of State control. That there may be an intimate connection between the State and interstate commerce, or that one may be affected by the other, is not sufficient.

In Stone vs. Farmers Loan & Trust Co., 116 U. S. 307, this Court distinctly held that although a road runs through several States, and forms a continuous line which is used for interstate commerce, it is none the less true that the corporation created by each State is, for all purposes of local government, a domestic corporation, and subject to regulation by the States respectively.

This Court, in the cases of Smyth vs. Ames, 169 U. S. 466, and Railroad vs. Tompkins, 176 U. S. 167, and Reagan vs. Trust Company, 154 U. S. 362, has decided that the State has a right to fix a rate for domestic commerce, but in doing so must fix it without relation to its intimacy with, or bearing upon, interstate, or foreign, commerce. The latter falls within the control of the National government, and the two must be kept separate and distinct. Each must bear its burdens and the reasonableness of its rate determined according to its own conditions.

In the opinion delivered by Judge Evans in the case at bar, it was held that the act could not be construed as applying to interstate commerce; 103 Fed. 216.

EXCESSIVE PENALTIES.

With respect to the doctrine laid down by this Court in *ex parte* Young, *supra*, as regards excessive and confiscatory penalties, it will be readily seen that there is no analogy between the act of the Minnesota Legislature condemned by this Court in that case and the act of the Kentucky Legislature of March 10, 1900. In the former case that provision of the Minnesota Act relating to the enforcement of penalties was condemned because each charge made in excess of each rate fixed by the Legislature of that State constituted a *separate offense;* neither notice nor hearing was given in advance of making the rates, and the fines and penalties were held to be so enormous and severe as to intimidate the carrier, its officers and employes from resorting to the courts to test the validity of the legislation.

Under the Kentucky law ample provision is made for both notice and hearing in advance of fixing of rates by the Commission; after the rates have been fixed they do not become effective until the expiration of ten days after a certified copy of the order and tariff made by the Commission is furnished to the carrier, and even then the carrier cannot be punished for disobeying the Commission's order without the written recommendation of the Commission to the grand jury that the offending carrier be indicted.

As we have heretofore endeavored to show, the carrier has the option.

First, to obey the Commission's order and charge rates not in excess of those fixed by the order.

Second, institute a suit in equity either in the State or Federal Court within the ten days before the order becomes effective, or thereafter, before the Commission has recommended that indictments be found, and try

the question just as is being done in this case.

Third, decline to avail itself of equitable relief, take chances on the Commission not recommending indictments, and, should indictments be found, raise the Constitutional questions by way of defense to the indictments.

As appears from the Young case, the Minnesota penalty for the first *"offense"* for a violation of the freight rates fixed by Statute was from $2,500 to $5,000, and from $5,000 to $10,000 for each subsequent *"offense."* For a violation of the passenger rates fixed by the Statute the penalty was either a fine of not exceeding $5,000, or imprisonment, or both the fine and the imprisonment for *each offense.*

Per contra, under the Kentucky law the penalty for the first *"offense"* is from $500 to $1,000, and for a second *"conviction"* from $1,000 to $2,000, and for a third and succeeding *"convictions"* from $2,000 to $5,000.

Thus it will be seen that under the Kentucky law there are no constantly recurring penalties.

The law nowhere declares that each over-charge shall be a separate offense; it speaks of a *"first offense,"* and a second, third and succeeding *"conviction."*

In Volume 12, page 949, Cyclopedia of Law and Procedure, the distinction between punishment for successive offenses and succeeding convictions is clearly defined.

> 1. "Statutes under which more severe punishment may be inflicted upon the accused where the crime of which he is convicted is a second or subsequent offense, being highly penal, should not be extended in their application to cases which in their the strictest construction come under their provisions. Such statutes are not unconstitutional, or objectionable upon the ground that they are *ex post facto* laws, that they inflict a double punishment for

the same offense, that they inflict cruel or unusual punishment, that they put the accused twice in jeopardy for the same offense, or that they impose a penalty on crimes committed outside the jurisdiction."

2. "The terms of the statutes employed in describing the prior offense vary greatly. A statute which provides increased penalties for subsequent offenses specifically named, does not require that the second offense shall be a repetition of the indentical crime of which the offender was convicted, but refers to any one of those specifically mentioned. An offense is no less a 'similar offense' to one previously committed by reason of the fact that the penalties for the two differ.

B. 1. "Inasmuch as the fact of a former conviction is a part of the offense, to the extent of aggravating it and increasing the punishment, it must be alleged in the information or indictment.

3. "The statutes increasing the punishment on account of a *former conviction* do not apply unless the offense for which the defendant is on trial shall have been committed *after the conviction as well as after the commission of the first.*" (Italics ours.)

In Brown vs. Commonwealth, 100 Ky. 127 (37 S. W. Rep. 496) the Court of Appeals of Kentucky said:

"The question presented for decision is whether the statute in question authorizes the imposition of the increased penalty for an offense not committed after the original conviction. We think not. The statute was manifestly intended to provide an increased penalty for a subsequent offense in order to deter the offender from its repetition. After punishment is imposed for the commission of a crime, the

double penalty is held *in terrorem* over the criminal, for the purpose of effecting his reformation, and preventing further and subsequent offenses by him. So we find that for a third offense the punishment of imprisonment for life is provided by the act, upon the theory, doubtless, that he must then be regarded as incorrigible. The reformatory object of the statute, namely, to provide a deterrent from future crime, would not be effected by a construction which gives to the offender no opportunity to reform. Moreover, 'doubtful questions as to the severity of the penalty are to be resolved in favor of the accused,'' (Am. & Eng. Ency. of Law, 726.)

And in the cases of Wilson vs. Commonwealth of Kentucky, 26 R. 685 (83 S. W. Rep. 427), and in the Standard Oil cases, 27 R. 1073, (87 S. W. Rep. 1092 and 1131, and 29 R. 20), that court held, under statutes similar to this, that the offense is a continuing one for which only one prosecution would lie.

See also Cawein vs. Commonwealth, 22 R. 1736 (61 S. W. Rep. 275).

Parks vs. N. C. & St. L. Ry., 49 Am. Rep. 655.

Friedenborn vs. Commonwealth, 57 Am. Rep. 464.

Am. & Eng. Ency. of Law, 2 Ed. Vol. 13, page 65.

Here the statute declares the offender guilty of extortion, and imposes a penalty; it does not impose any penalty for each several overcharge which may contribute to make up the offense of extortion. In *ex parte* Snow, 120 U. S. 274, s. c. 30 L. Ed. 658, where Snow, a Morman, was indicted under three several indictments charged with cohabiting with seven different women, against a Federal statute forbidding cohabitation with more than one, the Supreme Court held that one conviction was a bar to all others. It therefore follows that the

single penalty for any given time preceding an indictment, with the smaller Kentucky penalty, differentiates this case from the Young case; and that the terms of the act are not so severe as to intimidate the complainant from resorting to the courts to test its validity, as, indeed, it is doing in this action, thereby, as stated *supra*, affording the best evidence that it is not intimidated.

The Minnesota Acts, discussed in the Young case, provided that no duty rested on the Commission to enforce its provisions. In Kentucky, as above suggested, there can be no prosecution save upon the Commission's initiative.

The Supreme Court makes the case to turn upon the proposition that the fines and penalties would be imposed, "no prior hearing having ever been given"; in the case at bar the complainant's bill sets up the details of the prior hearing before the Commission, as demanded by the statute. And our prior suggestion will be recalled, i. e., that the Commission can fix the rate only after such hearing, that the Commission is bound by this statutory provision, and that "due process" is particular only in demanding a *hearing* without regard to the *form* of the hearing.

In the Young case the situation was acute. The prosecution actually had its inception. The defendant, the Attorney General of the State, had been arrested. There was a clash of State and Federal authority. Habeas corpus proceedings were instituted not by the corporation or its officers who were, as is contended, deterred by the prohibitive penalties, but by the stockholders.

In the case at bar the defendants had instituted no proceedings to enforce penalties for the violation of their order, and in their answer to the bills of complaint expressly deny any purpose to institute such prosecu-

tions, (see paragraph 26 of answer, page 100) and, in fact, it would not have been possible for the Commission to have recommended indictments at the time the restraining order was entered against it, for the obvious reason that the ten days time fixed by the act, before the order could become effective had not yet expired.

In the case at bar the injunction proceedings are brought by the corporation itself which, as has been said, at least demonstarates that the Kentucky legislation is not such "as to intimidate the Company and its officers from resorting to the courts to test the validity of the legislation." (Quoted from *ex parte* Young). Moreover, in the case at bar, the Kentucky Commission, before its order had become effective, was, by the courts restraining order entered herein (pages 71-2-3), in the language of the order itself, enjoined "*from continuing and from putting into force and effect* their order of June 20, 1906 and from instituting prosecutions for a violation thereof."

It follows that there can be no penalties for the infraction of the Commission's order fixing the rates *not yet effective*, and it will be remembered that by the terms of this restraining order the Commission is shown to be "not objecting," on the accepted condition that the complainant shall keep accounts of charges for freights shipped on the old rates pending this action; and the final decree and orders of injunction (pages 171 and 172) did actually revoke, or at least decree that the Commission revoke, the order fixing the rates complained of. Hence, it follows that complainant is in no danger whatever from accumulating penalties.

DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

While the issue, "due process and the equal protection of the laws," is tendered by complainant's bills and motions, we do not deem it necessary for the purposes of this case to burden the Court with an extended argument or citation of authorities on that subject.

It is well understood that the prohibition against deprivation of life, liberty or property except as authorized by the "law of the land," which Lord Coke says is synonymous with "due process of law," is as old as Magna Charta. The same prohibition was provided by the Fifth Amendment of the Federal Constitution and afterwards by the Fourteenth Amendment of that instrument.

The essential elements of "due process" are only these: *Reasonable notice and a fair opportunity to be heard.*

In Reetz vs. Mich. 188 U. S. 507, Mr. Justice Brewer in delivering the opinion of the court said:

> "*Due process is not necessarily judicial process.*"
>
> "A most exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous decision of this court that they *do not necessarily imply a regular proceeding in a court of justice or after the manner of such courts.*" Citing:
>
> Davidson vs. New Orleans, 96 U. S. 102.
> Murray's Lessee vs. Hoboken Land Co., 18 How. 272.
> See also *Ex Parte* Wall, 107 U. S. 829.

"A precise definition has never been attempted. *It does not always mean proceedings in court.* Murray's Lessee vs. Hoboken, 18 How. 272; McMillen vs. Anderson, 95 U. S. 37. *Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case.* Dent. vs. West Virginia, 129 U. S. 114; Lent vs. Tillson, 140 U. S. 316; Hagar vs. Reclamation District, 111 U. S. 701; Iowa Central R. R. Co. vs. Iowa, 160 U. S. 389; Ballard vs. Hunter, 204 U. S. 255."

In the case of Wilson vs. North Carolina, 169 U. S. 586, it was held that the Governor of that State did administer "due process of law" in deposing Wilson, a Railroad Commissioner, from his office without according to him the right to be heard in a court of justice.

See also Hagar vs. Reclamation District, 111 U. S. 701.
Wurts vs. Hoagland, 114 U. S. 606-615.
Bauman vs. Ross, 167 U. S. 590.

In McMillan vs. Anderson, 95 U. S. 541, this Court said:

"It must, under our Constitution, be lawfully done. But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding."

"It is not to be supposed that * * * * the amendment prescribing 'due process of law' is too vague and indefinite to operate as a practical restraint * * * * It must be, not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition—'the general

law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.'

"It follows that any legal proceeding enforced by public authority *whether sanctioned by age* and custom, or newly devised, in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be 'due process of law.'"

Hurtado vs. Cal., 110 U. S. 535.

"It is settled that, if provision is made for *notice* to, and *hearing* of, each proprietor, at some stage of proceedings, * * * * there is no taking of his property without 'due process of law'.

Paulsen vs. Portland, 149 U. S. 41.

The case of Hibben vs. Smith, 191 U. S. 321, is an interesting one and involved the validity of the Indiana Statute authorizing an assessment by the Trustees of the town of Irvington upon abutting property and giving a lien thereon for the cost of local street improvements. In affirming the judgment of the Supreme Court of Indiana this Court, Mr. Justice Peckham delivering the opinion, said:

"The amount of benefits resulting from the improvement is a question of fact, and a hearing upon it being assumed, the decision of the board is final. No constitutional question of a Federal nature arises therefrom.

"If the board of trustees refuse to hear the owners of property abutting the street improvement, in regard to the subject of benefits, and arbitrarily proceed to levy the assessment solely according to

the front foot, the Supreme Court of Indiana has held that such lot owner was not without remedy, and that he could, *by mandamus or injunction, compel a hearing* as to the amount of the assessment upon each lot, *or prevent the approval of the engineer's report until such hearing had been accorded*, and that the lot owner could not waive such a remedy and make the denial of a hearing available as a defense in an action to collect the assessment. Shank vs. Smith, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932. Under the cases above cited this Court follows the decision of the Supreme Court of Indiana upon this question of remedy. *The claim set up on the part of the lot owner, that there can be no due process of law under which an assessment can be made which does not provide for a review of such assessment and a hearing by a court is not tenable.* Assuming the necessity of a hearing before an assessment can be made conclusive, the law may provide for that hearing by the body which levies the assessment, and after such hearing, may make the decision of that body conclusive. Although in imposing such assessments the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there shall be a hearing before a court provided by the law, in order to give validity to such assessment. Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of the State may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned.

In Falbrook Irrig. Dist. vs. Bradley, 164 U. S. 112, 168, 41 L. Ed. 369, 392, 17 Sup. Ct. Rep. 56, 67, it was said that:

> "Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the State, and where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one provided by the statute."

> "And it was also said in that case that whether a review is or is not given upon any of these questions of fact (that is, as to the benefits and the amounts of the assessments) was a mere question of legislative discretion, so long as the tribunal created by the State had the power to decide them, and the opportunity for a hearing was given by the act, and that it was not constitutionally necessary in such case to give a rehearing or an appeal.

In Spring Valley Waterworks vs. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48, where the law provided for the fixing of water rates by a board of supervisors after a hearing, and without any right of review by any court, it was stated (at page 354, L. Ed. p. 176, Sup. Ct. Rep. p. 51) by Mr. Chief Justice Waite, giving the opinion of the court:

> "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise

than according to this rule.' See Spencer vs. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921."

"It is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the mode of procedure for those purposes gives *reasonable notice* and affords *fair opportunity to be heard* before the issues are decided."

Iowa, etc. Co. vs. Iowa, 160 U. S. 393.

"It is no longer open to contention that the 'due process' clause of the Fourteenth Amendment to the Constitution of the United States *does not control mere forms of procedure in State Courts, or regulate practice therein. All its requirements are complied with,* provided, in the proceedings which are claimed not to have been 'due process of law,' the person condemned has had sufficient *notice and adequate opportunity* has been afforded him *to defend.*"

L. & N., etc. vs. Schmidt, 177 U. S. 236.

Concisely stated, our contention is, that in the enforcement of the laws in question "due process and equal protection" is amply afforded:

(a) When notice and hearing is given by the Commission in advance of fixing just and reasonable rates in obedience to the command of the law.

(b) When, after a copy of the Commission's order has been furnished the carrier, and within the ten days thereafter and before the order becomes effective the carrier has the right to appeal to a Sstate or a Federal

Court of Equity to require a stay, modification or revocation of the order, or even thereafter to restrain the Commission from recommending indictments to the grand jury, thus preventing the order becoming effective, and holding it in abeyance until it shall be determined by the court whether the Commission has obeyed the mandate of the law by fixing only just and reasonable rates.

(c) When, after the carrier has waived its equitable remedy and elected to await the further action of the Commission in recommending that it be indicted, and the actual return of the indictment by the grand jury, and when cited to appear and defend, has the right to raise, in defense of the prosecution, all questions that it had the right to raise before the Commission and in the Court of Equity.

ARBITRARY POWER AND DISCRIMINATION.

The next contention of the bills of complaint and grounds of appellees' motion is that the Act of March 10, 1900, is unconstitutional and void, as a whole, because it confers upon the railroad commission arbitrary power, especially in the fact that under it the commission may establish rates upon particular articles and for each separate road, or for some of the roads and not for others, that it singles out Railroad Common Carriers, and that the Commission's order made pursuant to the act is for the same reason null and void. The Act does permit different rates to be established by the Commission for different railroads, but the Commission, under the act, is not compelled to establish different rates, nor is it compelled to proceed against one road alone with reference to the establishment of rates. The act makes it the duty of the Commission to investigate specific complaints made as to rates, but at the same time gives to the Commission the right to proceed, of its own motion,

whenever it has information, or even reason to believe, that the rate or rates which are being charged are extortionate. The question as to the reasonableness of the rates fixed by the Commission is, of course, not in issue upon this appeal.

It must be observed, however, that the aim of the act and of the Commission's order is to prevent extortion, and the limitation of the power conferred upon the Commission is to make rates which will be reasonable; whether the Commission has done so is a question of fact yet to be determined. The Commission has no power to make unreasonable rates; indeed, the making of such rates would be a violation of the express provisions of the act in this regard, protecting as it does the rights of the railroads as well as of the public. While different rates may be established for different roads, the rule for the making of rates is equal and uniform—that is, in every respect they must be just and reasonable. What might be a reasonable tariff for one railroad might be exorbitant for a second, and wholly insufficient for a third, under the rule established by this court in the cases of

Reagan vs. Trust Co., 154 U. S. 362.

Smyth vs. Ames, 169 U. S. 466.

Railroad vs. Tompkins, 176 U. S. 167.

Turnpike vs. Sanford, 164 U. S. 578.

If the law is equal and uniform, and applies to all falling within the same class, it is not, according to our understanding of the cases, open to the objection that it confers arbitrary power or unjustly discriminates against individuals, or violates the equality clause of the Fourteenth Amendment, even though, in its execution, differences may occur If there were no statute on the subject, but the matter were left to the operation of the com-

mon-law rule, the same alleged discrimination that could be made, under the statute, would actually occur. At common law, a common carrier is only entitled to charge a fair and reasonable compensation for the services required, and any excess could be recovered by the person employing the service.

Munn vs. Illinois, 94 U. S. 113, and cases above cited.

The main object in having maximum rates established is to make that which the common law leaves indefinite and uncertain, and to the determination of a jury, certain and fixed, and to give both the railroad and the public a fixed rule for the government of their conduct.

Since the advent of steam railroads, the common-law rule of leaving each individual shipper to adjust his rate with the railroad, according to what is fair and reasonable, has been found to be wholly impracticable, so that it may be said, we think with confidence, that a suit against a common carrier to recover an excessive charge under the common law has hardly been heard of in the modern growth or railroads.

The Kentucky act does not provide that the rate which the railroads must charge, as is provided in similar acts of many States, nor does the Commission's order so provide. It only attempts to fix maximum rates, and within the rate htus fixed it leaves the railroads to their own choice and selection, subject, of course, to the prohibition against discrimination.

The rule established by this court in a number of decisions, which will be cited, is that the rate which the railroad charges must be fair to the public as well as to the railroad. A railroad, being a public highway and performing a public service, is amenable to state control

in this regard, and its rights and the rights of the public are correlative. A rate which would be unjust to the public, and more than a reasonable compensation for the railroad, would be as much an infraction of the rights of the public as a rate which would be unjust to the railroad and less than a reasonable compensation, for it would impair its rights. The elements which control in the reasonableness of the rate fall under the same general rule, but yet vary with each railroad. Without attempting to give all of these elements, but naming only a few for illustration, we may say that the original cost of construction and equipment, considered with reference to the present value of each, the capitalization and bonded indebtedness, considered with reference to the value of the stocks and bonds and whether they have or have not been watered, the cost of maintenance and operation, considered with reference to whether the road is economically or extravagantly managed, form some of the bases from which the return due the road upon its traffic is to be calculated. The rule for the determination of this resultant fact is uniform and equal, but the fact determined will not be the same, because of the differences in the elements that go to make it up. The result is, that to have a uniform and equal rule, the resultant rate must necessarily be different for different railroads. Thus, a railroad constructed through a mountainous country, at great cost, must necessarily have a rate different from one with little or no fills or cuts, over a level country.

Again, railroads with the same cost of construction and equipment must have different rates, according to the population and character of business in the territory through which they operate.

The criticism, therefore, that different rates may be made by the Commission against different railroads, instead of condemning the act, should be its commendation

—the rule of the act being merely the rule of the common law, that in each and every case a just and reasonable rate shall be made.

To cite a concrete example, in reference to the Louisville Company: On its Elkton and Guthrie branch it charges a passenger tariff of five cents per mile. On its main line and branches it charges three cents a mile, and on its Mammoth Cave branch, which is patronized, in the main, only by excursionists to Mammoth Cave, it charges a rate of ten cents per mile. In fairness to the railroad, it cannot be said that the same rate should be charged on its Mammoth Cave branch which is charged on its main line. Upon these propositions, see

Smyth vs. Ames, 169 U. S. 466.

Reagan vs. Trust Co., 154 U. S. 362.

Railroad vs. Gill, 156 U. S. 664.

Railroad vs. Minnesota, 134 U. S. 418.

Railroad vs. Iowa, 94 U. S. 155.

Peik vs. Iowa, 94 U. S. 164.

Stone vs. Trust Co., 116 U. S. 307.

Starrs vs. Railroad, 11 S. 226.

Ruggles vs. Illinois, 108 U. S. 526.

Budd vs. New York, 143 N. Y. 517.

The circuit court, Judge Evans, seems to be of the opinion that the same rate must be fixed and applied to all railroads within the State, regardless of their conditions, circumstances or the territory through which they operate, and for this reason the Act of March 10, 1900, was held to discriminate against the different railroads, and to confer arbitrary power upon the Commissioners. It is said in the opinion, 203 Fed. 218:

"If one railroad should be convicted by the Commission of having been 'guilty of extortion,' and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone, and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge, as proper, a rate which, if charged, by the one thus convicted, would be deemed extortion, thus not merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its rivals, and depriving it of the equal protection of the laws. It can not be just; it can not be an equality of right or of protection for an act to be unlawful, if done by one railroad in Kentucky, and perfectly lawful if done by another railroad, in the same State."

The theory of the circuit court, we think, is contrary to the moving principle in the fixing of rates, in all of the cases, which have been before this Court, either on appeal or writ of error. The opinion assumes that the Commission will fix the rate for one road, and then rest from its labors to enjoy the luxury of seeing that road suffer the penalty of lower rates, while the others revel in extortion. The command is to fix just and reasonable rates for all roads whose rates are found to be extortionate, and the Commission, it must be assumed, will discharge its duty.

In Railroad vs. Iowa, 94 U. S. 155, it was held that classifications may be made according to the circumstances of the different railroads. It was there said:

"It is very clear that a uniform rate of charges for all railroad companies in the State might operate

unjustly in some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances."

In Turnpike Company vs. Sandford, 164 U. S. 578, brought to this Court on writ of error to the Court of Appeals of Kentucky, the very question now discussed was under consideration. It was there contended by the Turnpike Company that the Legislature of Ketnucky had fixed for it a rate, but had not fixed a rate for other turnpikes, and that because thereof it was discriminated against and denied the protection of the Fourteenth Amendment of the Federal Constitution. Mr. Justice Harlan, in delivering the opinion of the court in that case, upon this question, said, on page 598:

"It is further insisted by the company that the rates prescribed for it by the Act of 1890 are much less than those imposed by the General Statutes of Kentucky upon other turnpike companies of the State; consequently, that that act denies to it the equal protection of the laws. The proposition of the defendant is, that the constitutional provision referred to requires all turnpike companies in the State to be placed by the legislature, when exercising its general power over the subject of rates to be charged upon highways of that character, upon substantially the same footing. Upon this point the Court of Appeals of Kentucky said: 'A turnpike road leading into and connected with a populous city like that

of the city of Covington could afford to charge less toll by reason of the immense travel upon it, than turnpikes in thinly settled portions of the county or State, and hence under former Constitutions the legislature has seen proper to regulate the tolls as the turnpike may happen to be located.' The circumstances of each turnpike company must determine the rates of the toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just, both to it and to the public. If the rates prescribed for the defendant in this case were manifestly much lower—taking them as a whole—than the legislature has, by general law, prescribed for other corporations whose circumstances and location are not unlike those of the defendant, a different question would be presented. At any rate, no case of that kind is properly presented by the pleadings, and there is no ground for holding that the Act of 1890 denies to the defendant the equal protection of the laws."

In that case it was held by the State court, reported in 14 K. L. R. 689, 20 S. W. 1031, that the act did not violate any provision of the State Constitution, and it was held by this Court, on writ of error, that the fixing of a rate against that turnpike alone did not violate any provision of the Federal Constitution. The State court

was reversed, however, because it was held that the reduction of the rate was so great as to deny the turnpike a fair return on its property, and operated to compel the turnpike to do business at a loss.

To the same effect is the case of Commonwealth vs. Covington and Cincinnati Bridge Company, 14 K. L. R. 836, 21 S. W. 1042, where the rate complained of specially applied to the Covington Bridge. That case, on writ of error, was reversed in 154 U. S. 205, but solely on the ground that as the bridge was a link of communication between the State of Kentucky and the State of Ohio, the statute, in fixing a rate, regulated interstate commerce.

Nor is the Act of March 10, 1900, open to the criticism of Judge Evans that no standard is fixed for the control of the Commissioners in fixing the rate, thereby giving them arbitrary power. Were the act silent upon this subject, the constitutional limitation, that a reasonable rate was to be fixed, would be read into the act. Such is the ruling in a great number of cases heretofore cited in this brief, and which need not be here repeated.

In the case of Smyth vs. Ames, 169 U. S., where the statute, as the act now in question, referred to reasonable maximum rates, this Court observed, on page 527:

> "Before entering upon its examination, it may be observed that the grant to the legislature, in the Constitution of Nebraska, of the power to establish maximum rates for the transportation of passengers and freight on railroads in the State, has reference to reasonable maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness."

For the act in question to have laid down any other rule it would necessarily have been compelled itself to

name the rate, and, therefore, the services of the Commission, in that regard, would not have been needed.

Again, in the case of Smyth vs. Ames in speaking of the particular facts of each railroad with reference to which the rate must be fixed to be reasonable, whether applying to interstate or State commerce, the opinion (on page 540) says, quoting from the opinion of Mr. Justice Brewer, in 64 Fed.:

> ("But they are not necessarily bound to give absolutely the same rates to the people of all the States), for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result, in one, in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two States, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the State of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two States is of comparatively little significance." 64 Fed. Rep. 165. "In these views we concur, and it is unnecessary to add anything to what was said by the circuit judge on this point."

And again, on page 547:

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. * * * On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the Act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution."

We think it is apparent from this decision that the condition of each road forms a separate and distinct basis with reference to the reasonableness of the rate to be fixed, and that a rate can not be reasonable and fair to both the railroad and the public, which applies to all railroads, regardless of their different conditions. In the case cited, the reasonableness of the rate was considered with reference to each road separately, and we believe the inference is justified that if the Court had found the schedule of rates reasonable, with reference to any particular road, the injunction would have been denied to it, although granted to the others.

To the same effect is the case of Reagan vs. Trust Company, 154 U. S., where the statute expressly required the rate to be fixed with reference to railroads separately.

In the acts of both of the cases cited, and in fact in the laws of all the States where power is given to fix rates, the railroad commissions are vested with the power to change and alter the rates, from time to time, a feature of the Kentucky Act of March 10, 1900, referred to in the opinion of Judge Evans as conferring arbitrary power upon the commission. This same feature appears in the Act of Congress creating the Interstate Commerce Commission, but this Court has never, so far as we are informed, found that such a provision, either in the Federal law, or in any State law, is open to objection. On the contrary, from the reasoning of the cases, it appears that some such elasticity in the regulation of rates is necessary to keep them, at all times, fair and reasonable. If the rate be fixed by the Legislature, it must stand, if at all, until the next session of that body. What is reasonable and fair one year may not be such the following year. That the Commission might permit unjust discriminations under the powers conferred is no objection to the validity of the act, so long as it does not demand or authorize such discrimination. The possibility of such discrimination should have no more weight against the validity of this act than the possibility of an unjust enforcement which pertains to every law. The law itself provides an equal and uniform rule for the making of rates. *They must be just and reasonable.* The power conferred to alter or change the rates is only a provision to insure the establishment and maintenance of reasonable rates at all times and under all circumstances for each road.

In Railroad vs. Matthews, 174 U. S. 96, on writ of error to the Supreme Court of Kansas, the validity of an act of the legislature relating to liability of railroads for damage by fire was before this Court. Mr. Justice Brewer, in delivering the opinion of the majority, said

(page 104), after quoting from the case of Barbier vs. Connolly, 113 U. S. 27:

> "This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."

And again, on page 106:

> "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In Williams vs. Mississippi, 170 U. S. 214, this Court, speaking through Mr. Justice McKenna, in regard to a claim that the law of Mississippi discriminated against the negro race, distinguishing the case then before the Court from the case of Yick Wo vs. Hopkins, 118 U. S. 356 (which, most likely, will be relied upon by complainants in the case at bar), said (page 223):

> "There is no charge against the officers to whom is submitted the selection of grand or petit jurors, or those who procure the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the Constitution or laws, or by those who administer them. If it is done in the latter way, how or by what means should be shown."

The court then ruled that the equal protection of the laws is not denied on the ground of unjust discrimination, simply because it grants a discretion to certain officers, which can be used to the abridgement of the

right of an individual, unless it be shown that the actual administration of the law is to this effect, and is evil; but the possibility of an evil administration is no concern of the court.

In the Chinese Laundry case, 118 U. S., there was an actual purpose in the law to discriminate, and an actual discriminating administration of that law. It conferred naked, arbitrary power on a board of supervisors to say who should conduct business, without prescribing any qualification whatsoever. The board might arbitrarily withhold its consent from one person and grant it to another under like circumstances. The law in question here, however, applies equally to all railroad corporations in the Commonwealth alike.

Sustaining the same principle, is the case of Grundling vs. Chicago, by Mr. Justice Peckham, 177 U. S. 183, involving the Chicago cigarette ordinance.

In Budd vs. New York, 143 U. S. 517, the law of the State of New York, regulating the fees and charges of elevators and warehouses, applied only to those located in places which had a population of 130,000 or more, but it was held by this Court that such a limited application did not amount to a discrimination which deprived the warehouses and elevators in such places of the equal protection of the laws.

In Dow vs. Beidelman, 125 U. S. 680, this Court, in an opinion delivered by Mr. Justice Gray, in treating of the contention that the rate law of Arkansas violated constitutional limitations in making an unjust discrimination, said:

> "The Legislature, in the exercise of its powers of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do.

Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provisions securing to all the equal protection of the laws."

Laws levying a tax on inheritances, graduated according to the value of the estate, and on lineal and collateral relationship to the testator or intestate, are held to be valid.

Magoun vs. Trust Company, 170 U. S. 282.

Another contention of the bills of complaint is that the Act of March 10, 1900, is invalid because it does not apply to all common carriers, but applies only to railroads.

We do not think that this contention is forceful, in view of the many decisions of this Court.

In Orient Insurance Company vs. Daggs, 172 U. S. 560, it was held that a fire insurance company, under the law of the State of Missouri, was not denied the equal protection of the laws by a statute which was applicable only to fire insurance. In that case, in an opinion delivered by Mr. Justice McKenna, it is said on page 562:

"It is not necessary to state the reasoning upon which classification by legislation is based or justified. This Court has had many occasions to do so, and only lately reviewed the subject in Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283

(42:1037). We said in that case that 'the State may distinguish, select and classify objects of legislation, and, necessarily, the power must have a wide range of discretion.' And this because of the function of legislation and the purpose to which it is addressed. Classification for such purposes is not invalid, because not depending on scientific or marked differences, in things or persons, or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary."

In Railroad vs. Mackey, 127 U. S. 205, a law of Kansas abrogating as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another, was sustained as a valid classification, notwithstanding that it was not applied to other carriers. In that case this Court held that the law was not violative of the equality clause of the Fourteenth Amendment, "if all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed."

In Railroad vs. Beckwith, 129 U. S. 26, a law of Iowa, making a class of railroad corporations for special legislation, was sustained.

In the case of Railroad vs. Bristol, 151 U. S. 555, it was held that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike.

Of like nature is the case of Railroad vs. Humes, 115 U. S. 512, regarding the railroad fence laws of the State of Missouri.

In Bowman vs. Lewis, 101 U. S. 22, a statute of Missouri was drawn in question. In four counties of

the State appeals from the judgments of the circuit courts were allowed to the Court of Appeals. In all other counties appeals were allowed to the Supreme Court, which was also given appellate jurisdiction over certain judgments of the Court of Appeals. This Court upheld the statute, and in the opinion said:

> "If diversity of laws and judicial proceedings may exist, in the several States, without violating the equality clause of the Fourteenth Amendment, there is no valid reason why there may not be such diversity in different parts of the same State. When part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

Where the diversity pointed out by the Court exists, as, for example, in a great State like Texas, is it not as needful for the State to possess the power to adjust the rates for different roads, existing and operating under diverse conditions, as it is to provide laws and judicial procedure for each locality? The power, in the opinion of this Court, was left in the States to meet such exigencies.

Again, in Hays vs. Missouri, 120 U. S. 68, another statute of Missouri was considered and upheld by this Court. The statute in question, in certain counties, allowed the State a certain number of peremptory challenges in criminal cases. In the other counties the State was allowed fewer challenges. A person tried and convicted in a county where the State was allowed the greatest number of challenges, complained that he was

denied the equal protection of the law. Concerning this contention this Court said:

> "The Fourteenth Amendment * * * does not prohibit legislation, which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privilege conferred, and in the liabilities imposed."

The railroad companies are only entitled to the equal protection of the law, in reasonable rates. They have no right to be protected in unreasonable rates. Neither have they the right to have another company or companies protected in such unreasonable rates, in order that they may thereby maintain unreasonable rates for themselves. Consequently, the law which empowers the Commission to investigate the rates and make them conform to the standard prescribed, operates on all alike who may be charging unreasonable rates.

In Missouri Pac. Railway vs. Mackey, 127 U. S. 205, in reply to the contention that the law complained of only applied to railroads, the Court said:

> "It is simply a question of legislative discretion, whether the same liabilities shall be applied to carriers by canal and stage coaches as to persons and corporations using steam."

To the same effect is Soon Hing vs. Crowley, 113 U. S. 703. The contention in the bill (paragraph 8, page 14, R.), that the appellees are denied the equal protection of the law, because the Act of March 10, 1900, only applies to "railroad companies or cor-

porations," is untenable, because, under the law of Kentucky, a railroad can not be operated by a private person. Under Section 562, Kentucky Statutes, if a person should become the owner, at private sale or under judgment of a court, of a franchise and property of a railroad corporation, he is required to organize a corporation for the operation and management of such railroad. The organization of such corporation is provided for by Sections 538, 539 and 763, Kentucky Statutes.

It therefore follows that inasmuch as a railroad can be operated in Kentucky only by a company or corporation, there can be no discrimination under the statute against such companies or corporations.

The statutes of Kentucky requiring that railroads can be operated only by corporations, is declaratory of the law as announced in State vs. Boston Railroad Co., 25 Vt. 433, where it was said that the "right to build and run a railroad, and to take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the Legislature."

The sections of the Kentucky Statutes referred to will be found in the appendix.

Upon the propositions here discussed, we, therefore, contend:

1. That the Act of March 10, 1900, does not confer arbitrary power upon the Railroad Commission, and does not provide for any arbitrary or unjust classification or discrimination in the making of rates and the Commission's order was neither arbitrary nor discriminating.

2. If there is a possibility of an evil administration of this law, it is no more than can be said of any existing law; and the Court will not, in advance of a full hearing as to the reasonableness of the rates fixed

by the Commission's order, assume a violation of public duty by these officials.

3. The rule of the Act is to fix reasonable rates which involves the correlative rights of the railroads and the public. That different rates may be made for different railroads under different circumstances is a result of the necessity of an equal and uniform law. The same rate for all railroads, regardless of circumstances, would, in many instances, be arbitrary and unjust, either to the railroad or the public.

4. Classification is not a denial of the equal protection of the laws, but is demanded in many instances by proper legislation, and railroads have always been held to constitute a separate and distinct class from other corporations.

CONTRACT.

The questions heretofore discussed are common to all of the cases, but the questions under this heading of "Contract" apply only to the Louisville Company.

Prior to the adoption (September 28, 1891,) of the present Constitution of Kentucky, charters for railroads and other corporations were granted by the Legislature. Section 59, Sub-section 17, of that instrument revoked this power; and all such corporations thereafter organized must be established in conformity with the requirements of Chap. 32 of Kentucky Statutes.

The contract of the Louisville Company is claimed under Section 18 of its charter approved March 5, 1850, entitled, "An Act to Charter the Louisville & Nashville Railroad Company," Said Section reads as follows:

"Section 18. That the president and directors shall have power to purchase, with the funds of said

company, and place on any railroads constructed by them, under this act, all machines, wagons, vehicles or carriages of any kind, which they may deem proper, for the purposes of transportation on said road; and that they shall have power to charge for tolls, and the transportation of persons, merchandise, and property of any kind whatever, transported along said railway, any sum not exceeding the following rates, to-wit, on all goods, merchandise or property, for every one hundred pounds transported over twenty miles and under fifty miles, three and a half mills for each mile; and for persons, and every species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort; that it shall not be lawful for any other company, or any other person or persons, to travel upon or use any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof; and that the said road or roads, with all their works, improvements or profits, and all the carriages, vehicles and machinery for transportation used thereon, and all other species of property thereunto belonging, are hereby vested in said company incorporated by this act, and their successors forever; and shall never be taxed beyond the rate of tax imposed upon real estate, estimated upon the prime cost of the proposed works; nor will the legislature of this Commonwealth, for the space of thirty years, authorize any other railroad to be laid down on a parallel line with the one located by this company, extending from Louisville to the Tennessee line, approaching nearer than ten miles: Provided, full power is hereby re-

served to this State to incorporate, hereafter, a company or companies to build a railroad or railroads, hereafter constructed, which may connect and join with the road hereby contemplated; and full right and privilege is hereby reserved to the State, or individuals, or any company heretofore or hereafter incorporated by law of this State, to cross this road, provided any other railroad connecting with the road hereby provided for shall lead from the main route and diverge therefrom at an angle of twenty degrees or more: Provided, that in forming such connection, or in crossing said road, no injury be done to the works of the company hereby incorporated; and that nothing in this act shall be so construed as to deprive any subsequent legislature of the power to authorize the 'Kentucky Mississippi Railroad Company' to extend their said road from Hopkinsville to Louisville, or of the power at any time hereafter of incorporating a company to construct a railroad from Louisville to some point upon the Mississippi river, in this State."

And Section 20 of an act approved February 28, 1848, incorporating the Lexington & Frankfort Railroad Company, referred to in the aforesaid section of the charter of the Louisville Company, reads as follows:

"Section 20. Be it further enacted, that the said board of directors shall have power to purchase, with the funds of said company, and place on any railroad constructed by them, under this act, all machines, wagons, vehicles or carriages, of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on

said road, and that they shall have power to charge for tolls, and the transportation of persons, goods, produce, merchandise and property of any kind whatsoever, transported by them along said railway between Lexington and the Kentucky River, any sum not exceeding the following rates, to-wit, for transporting any distance, single packages, weighing less than one hundred pounds, twenty-five cents; and at that rate if such packages weigh more than one hundred pounds; for transporting goods, produce, merchandise, or property of any kind, not less than three and a half mills, nor more than four mills, per hundred pounds weight, per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile for each passenger, with his baggage, not weighing more than forty pounds; except upon the article of coal, upon which there shall be charged not less than three cents on the bushel; but the charge on coal shall at no time be fixed at a rate which will not yield a profit on its transportation. Live stock, poultry and furniture; also feathers, wool, rags and other light, bulky articles, weighing not more than sixty-five pounds to the cubic foot; also silver and gold, bullion, money of all descriptions, and mails, are excepted from the rates herein established; and the board of directors, or their agents, shall be, and they are hereby authorized to contract specially for their transportation, upon such terms as the parties interested may agree upon: Provided, such rates shall in no case exceed fifteen per cent over the rates allowed to be charged for heavy merchandise or produce, except for gold, silver, bullion, money of

all kinds, and mails. The said board of directors, and their agents, may charge for receiving, forwarding and storing such articles and packages as may be consigned to them, or deposited in their warehouses, or with their agents, for safekeeping, or to be forwarded; and they may establish, by their by-laws, rates of storage, and other fees, for such services. But they shall make no rule or regulation, giving any preference in transportation of goods or other articles sent from other houses, stores or places; nor shall they make any difference in the rates of charges on goods, or other property, consigned to other persons for transportation on said road; but shall, in all things, receive and receipt for goods and property of every kind consigned to other persons, on the same terms as if consigned to themselves. It shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons or merchandise, or property of any description whatsoever, along said roads, or any of them, without the license or permission of the board of directors of said company, and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said roads, are hereby vested in said company incorporated by this act, and their successors forever. They may commence the business of transportation on their railroad when any part thereof is completed."

By Section 2 of the Act of March 5, 1850, incorporating the Louisville Company, it is created a corporation with perpetual succession. That section reads as follows:

"Section 2. That the capital stock of said Louisville & Nashville Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, which may be subscribed for by any individual or corporation; and as soon as three thousand shares of said capital stock shall be subscribed the subscribers of said stock, their successors and assigns, shall be, and they are hereby, declared to be incorporated into a company, by the name of the Louisville & Nashville Railroad Company, and by that name shall be capable of purchasing, holding, selling, leasing and conveying real estate not exceeding ten thousand acres, and personal and mixed estate, so far as the same shall be necessary for the purposes of their incorporation, and no further; and shall have perpetual succession, and by said corporate name shall sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at pleasure; and shall have, enjoy and exercise all the powers, rights and privileges which other corporate bodies may lawfully do."

By Section 14 of that act, it is incorporated only to construct a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville. That section reads as follows:

"Section 14. That the president and directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville; the route to be by them selected and determined, not exceeding sixty-six feet wide, with as many sets of tracks as they

may deem necessary; and that they may cause to be made contracts with others for making said railroad, or any parts of it; and that they, their agents, engineers, etc., or those with whom they may contract for surveying or making the same, or any part thereof, may enter upon, use and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other structures or works necessary to said road and its use, or for any other purpose necessary or useful in the construction or repair of said road, or its works and appurtenances; and they may build bridges and construct tunnels: Provided, the same do not obstruct the navigation on navigable streams; may fix scales and weights, lay rails, take and use any earth, timber, gravel, stone, or other material, which may be useful or necessary for the proper construction, completion or repair of said road."

It is our contention that:

1. This Court in L. & N. vs. Commonwealth of Kentucky (2 cases) 161 U. S. 701, and 183 U. S. 505 has twice held that the charter of appellee, the Louisville Company, is not an irrevocable contract.

2. That Company when it accepted the various amendments to its charter and espically when it accepted the provisions of the Constitution and Statutes of Kentucky (paragraph 2, pages 76 and 77 appellants' answer) abandoned and relinquished all special privileges, if any it had, under its charter in conflict with the Constitution and laws enacted pursuant thereto.

3. That the matter of regulating rates of a railroad pertains to that branch of the police power which is not the subject matter of an irrevocable contract.

4. If it be possible for a State to preclude itself from the exercise of this power by an irrevocable contract, the charter of the Louisville Company does not come to an irrevocable contract on the subject of rates.

5. The charter provisions relied upon to create an irrevocable contract, has reference only to the main line of the Louisville system between Louisville and the Tennessee line, in the direction of Nashville, which, according to the allegations of the bill (R. 2), is 139.88 miles.

In Louisville & Nashville Railroad vs. Kentucky, 161 U. S. 677, on writ of error to the Court of Appeals of the State of Kentucky, regarding the right of the Louisville & Nashville Railroad to purchase a parallel railroad, notwithstanding a provision of the State Constitution of 1891, prohibiting such purchase or consolidation, it was contended on behalf of the road, that, under its charter, granted in 1856, it had an irrepealable contract with the State, conferring upon it this power. In speaking upon that subject, Mr. Justice Brown, in delivering the opinion of the court, said (page 695):

> "While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the Pearsall case, that under its police power the people, in their sovereign capacity, or the legislature as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health and safety of its passengers, or the public, or for the security of property, or the conservation of the public interests, provided, of course, that no vested rights are thereby impared. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but

otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests."

In the case of Pearsall vs. Railroad, 161 U. S. 648, this court, speaking through Mr. Justice Brown, in a case involving the rights of a State to prohibit the consolidation of two railroads, notwithstanding permission so to do was granted in its charter, said (page 667):

> "The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact and bare promise to allow a certain thing to be done, it will be construed as a revocable license." (Citing a great number of cases).

And again (page 675):

> "We think it was competent for the legislature out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we can not recognize a vested right to do a manifest wrong."

In L. & N. vs. Kentucky, 183 U. S. 518, it was again claimed that the Louisville Company's charter gave it an irrevocable contract, or, at least, that such a contract must be implied from the language of the charter. This Court, Mr. Justice Shiras delivering the opinion, said:

"So far as the question of an implied contract is concerned, we perceive no distinction between the case of a railroad company incorporated before and that of one incorporated after the constitutional enactment in question. As it has been said of the one so it may be said of the other, that the charter is taken and held subject to the power of the state to regulate and control the grant in the interest of the public.

"In Pennsylvania R. Co. vs. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted such a contract between the state and the company as exempted the latter from the operation of the subsequently adopted Constitution of Pennsylvania; that a constitutional provision, as applied to the company, in respect to cases afterwards arising, did not impair the obligation of any contract between it and the state; and that the company took its charter subject to the general law of the state and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

"The same principle was announced in Louisville Water Co. vs. Clark, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; and in L. & N. R. Co. vs. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

"In the absence then, of any express prior contract between the state and the company, exempting the latter from future constitutional enactments, and

without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the state, it is sufficient to say that we do not find in Sec. 218 of the Constitution of Kentucky any impairment of an existing contract between the state and the plaintiff in error."

In the case of the Louisville Company it is admitted that the company is now charging rates very much below the maximum rates named in its charter. In fact, if it should charge up to the maximum there permitted, the rates would be almost confiscatory as to freight passing over its lines. Its contention, however, is that it has an irrevocable contract to charge the maximum there named, and, therefore, any reduction of its rates results in a violation of its contract with the state.

The circuit court (Judge Evans, 103 Fed. 216) practically held that the Louisville Company had an irrevocable contract with the State, but, if not, the Act of March 10, 1900, can not be construed as intending to apply to the Louisville Company.

We are not unmindful of the fact that the right of taxation, than which there is possibly nothing more essential to the sovereignty of a State, may be bartered away. By repeated decisions the Court is committed to this doctrine, but not without stubborn opposition. It must also be borne in mind that the decided tendency is against any further extension of the doctrine of the Dartmouth College case. On the contrary, the tendency seems to be to confine the doctrine of that case, except in so far as the court has heretofore been committed, to strictly private corporations. At all events, the court has

refused to extend or apply the doctrine to numerous exemplifications of the police power not more important than the one now under consideration.

Well established is the doctrine that that which pertains to the health, morality, welfare and good order of a State can not be bartered away by contract:

Stone vs. Mississippi, 101 U. S. 814.
Douglas vs. Commonwealth, 168 U. S. 488.
Fertilizing Co. vs. Hyde Park, 97 U. S. 659.
Louisville & Nashville Railroad vs. Kentucky, 161 U. S. 677.
Boston Beer Co. vs. Massachusetts, 97 U. S. 25.
New Orleans Gas Light Co. vs. Louisiana Light Co., 115 U. S. 650.
Mugler vs. Kansas, 123 U. S. 623.
Slaughter House cases, 111 U. S. 746.

In Ruggles vs. Illinois, 108 U. S. 536, where a contract excluding the state from the exercise of its power to regulate rates was strongly urged upon the court, Mr. Chief Justice Waite used this language:

> "In the view we have taken of this case, the the only question that need be considered is, whether the charter of the Central Military Tract Railroad Company, one of the Illinois corporations which, through agreements of consolidation, are now represented by the Chicago, Burlington & Quincy Railroad Company, purports, on its face, to grant to the company the right to fix the rates of fare and freight to be charged for the conveyance of persons and property on its railroad, free of all control by the state. *If, on examination, we find that no such grant was intended, it will be unnecessary to decide whether*

one legislature has the power to bind succeeding legislatures by a contract to that effect."
(The italics are ours.)

In New Jersey vs. Yard, 95 U. S. 104, Mr. Justice Miller, in delivering the opinion of the court, used this language:

"The writer of this opinion has always believed, and believes now, that one legislature of a state has no power to bargain away the right of any succeeding legislatures to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

In Stone vs. Trust Company, 116 U. S. 307, Mr. Chief Justice Waite, delivering the opinion of the court, said, in speaking of the power of a state to contract away its right to regulate railroad rates:

"This power of regulation is a power of government continuing in its nature, and *if it can be bargained away at all* it can only be by words of positive grant or something which is, in law, equivalent." (The italics are ours.)

Although in that case both Mr. Justice Harlan and Mr. Justice Field dissented, on the ground that the rates of the road were protected by a contract, the dissent was not upon the theory that the State had a right to preclude itself by contract from making reasonable rates, but the theory of both the dissenting opinions seems to be that at that time it was conceived that, under the

regulating power of the State, the road would be bound by whatever rate the State might fix. In that case the extent of the right of the State to contract regarding the regulations of rates is, as we understand the dissenting opinions, to prevent the Commission from making unreasonable rates and enforcing them against the roads. Mr. Justice Harlan, in his opinion, said:

> "My only purpose is to express the conviction that each of these companies has a contract with the State, whereby it is exempted from absolute legislative control as to rates, and under which it may, through its directors, from time to time, within the limit of reasonableness, establish such rates of toll for the transportation of persons and property as they deem proper; *such rates to be respected by the courts and by the public, unless they are shown affirmatively to be* unreasonable." (The italics are ours.)

Mr. Justice Field, in his opinion, said:

> "Certainly no one will deny that the right to adopt a rate of charges, *subject, as such rate always is, to the condition that they shall be reasonable, was of vital importance to the company.* Without that concession no one acquainted with the difficulties, expenses and hazards of the projected enterprise can believe that it would have been undertaken. It was certainly the expectation of the constructors of the road that they should be allowed to receive compensation having some relation to its cost. But the Act of Mississippi allows only such compensation as parties appointed by the legislature, not interested in the property nor required to possess

> any knowledge of the intricacies and difficulties of the business, shall by the legislature, not interested in the property nor required to possess any knowledge of the intricacies and difficulties of the business, shall determine to be a fair return on the value of the road and its appurtenances, though they may be much less than the original cost." (The italics are ours.)

We do not think that either of these dissenting opinions tends to sustain the doctrine that the state, by contract, can preclude itself from regulating the railroads so as to require them to put in force a schedule of rates reasonably fair, both to itself and the public.

In the case at bar, the Louisville Company, is seeking to have the court adjudge that it, by contract with the state, can charge a rate unreasonable and unfair to the public and amounting almost to the confiscation of the property of the shipper.

In the more recent rate cases, where a contract regarding rates has been claimed, the court has either avoided the question, or has answered it by finding that in the particular case there was not a contract.

In Railroad vs. Illinois, 146, U. S. 387, touching the Lake Front in Chicago, claimed by the railroad under a contract and grant from the state, Mr. Justice Field, in delivering the opinion of the court, said:

> "There can be no irrepealable contract in a conveyance of property by the grantor in disregard of a public trust under which he was bound to hold and manage it."

In Railroad vs. Nebraska, 170 U. S. 57, on writ of error to the Supreme Court of Nebraska, it was con-

tended on behalf of a railroad that the viaduct which the state was seeking to compel it to maintain and repair had been constructed by it under a contract with the state, which relieved it from this obligation. Mr. Justice Shiras, in delivering the opinion of the court in that case, speaking on the contention of the contract, said (page 72):

> "No doubt, the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation? Usually, where a contract, not contrary to the public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature, when exercised to protect the public safety, health and

morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot, in every case, be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

To the same effect, see:
Railroad vs. Bristol, 151 U. S. 556.
Railroad vs. Defiance, 167 U. S. 88.

It would seem that the regulation of railroads to prevent the imposition upon the public of extortionate rates, is as important to the welfare of the people as the prevention of monopolies by the consolidation of public agencies. In fact, the object of preventing consolidation is to prevent extortion. If the one is not the subject matter of an irrevocable contract, neither should the other be.

If an irrevocable contract can be made touching the rates of a common carrier, the question still remains as to whether the particular provision relied upon comes to a contract on the subject within the protection of the Federal Constitution.

To do this, it is our contention that the language of the charter provision, referring to rates, must do more than merely fix a maximum, and that it must show clearly that the State intended to exclude itself, in the future, from exercising any power to change or alter the rates fixed. The charter must not only fix the rates for the time being, but must also, by clear language or necessary implication, exempt the corporation from all

future and further regulation on the subject. If the charter merely fixes the maximum of rates, then it is competent, at any time, for the State further to regulate the rates within the maximum thus made. Such action would be no violation of the contract, even if the charter provision were construed as a contract fixing the maximum. The fixing of such a maximum precludes the corporation from charging beyond it, but leaves the corporation the power to fix any rate within the maximum when circumstances alter. Added to this is the common law and common understanding that the rate fixed within the maximum shall be reasonable. It is the duty of the corporation to fix a rate reasonable to the public. The State, unless it has by words of exemption precluded itself, is at all times, at liberty to compel the corporation to do that which is its duty to do. A charter incorporating a railroad and fixing a maximum of rates is not, in legal effect, different from a charter granted under an existing general law which fixes such a maximum.

It will hardly be contended that a railroad, simply because it was chartered while a general law existed fixing certain rates, thereby had a contract with the State that those rates should exist for all time to come. By either a general law or a specific provision in a charter fixing a schedule of maximum rates, the Legislature undertakes only to say that such a schedule, at that time, is reasonable, still reserving, however, the power to change the rate as circumstances change.

It is not to be forgotten that under the second section of the charter of the Louisville Company, quoted *supra*, it is made a perpetual corporation. Therefore, if the provisions relied upon constitute a contract, the Legis-

lature of Kentucky, in 1850, has undertaken the foolish task of providing a maximum schedule of rates to govern to the end of time, regardless of the fact, necessarily contemplated, that in the course of events, such rates must become extortionate.

Mr. Tiedeman, in his work on State and Federal Control of Persons and Property, page 952, Section 209, in speaking of the rule for the interpretation of such provisions in charters, says:

> "Apart from the question whether the State can barter away its police power, the intention of a legislature to place a private corporation beyond the reach of the police power of the State—to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint, which is not provided by the laws in force when the charter was granted—is so manifestly unreasonable that we can not suppose that the legislature so intended, unless this extraordinary privilege is expressly granted."

And again, on page 955:

> "Unless there is an express reservation of a freedom from the restraint of police regulations, it would be an exceedingly liberal, and, hence, wrongful, construction of the constitutional protection against the impairment of the obligation of contracts, to place corporations above and beyond the ordinary police power of the State. As a general proposition, the principle here advocated has been recog-

nized and adopted by the courts generally. It is only in the application of the principle to a particular case that any doubt as to its correctness is felt or expressed."

Mr. Russell, in his work on Police Powers of the State (pages 127, 128), lays down the rule thus:

"The decision in the Charles River Bridge case is the existing law as appears in the recent opinion of Mr. Justice Gray. He said that every public grant, if ambiguous, is to be construed, against the grantee, because an intention to grant away rights in which the whole public is interested can not be presumed unless unequivocally expressed, or necessarily to be implied; and, also, because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him, and the words used are to be treated as the words of the grantee. 'This rule of construction,' he said, 'is a safeguard of the interest of the public against any attempt of the grantee to take by the insertion of ambiguous language what could not be obtained by clear and express terms,' citing the Charles River Bridge case and others," citing:

Central Transp. Co. vs. Pullman Co., 139 U. S, 49, and other cases.

In Fertilizing Co. vs. Hyde Park, 97 U. S. 659, this Court said:

"The rule of construction in this class of cases is that it shall be construed most strongly against the corporation Every reasonable doubt is to be re-

solved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

In Minott vs. Railroad, 18 Wall. 204, known as the Delaware Railroad Tax cases, it was held that a provision in the charter that the railroad company should pay annually into the treasury of the state a tax of one-quarter of one per cent. on its capital stock of $400,000.00, without any words indicating the intent of the legislature that no further or different tax should be subsequently levied, was not sufficient to show a contract prohibiting the state from making a different tax levy, the court there remarking:

"The surrender, when claimed, must be shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power."

To the same effect is Bailey vs. Maguire, 22 Wall. 215.

In Stone vs. Wisconsin, 94 U. S. 181, it was held that a charter provision making it lawful for the company to demand and receive such sum or sums of money for passage and freight of persons and property as they should, from time to time, think reasonable, did not amount to a contract, delegating to the railroad the right to fix its own rates.

In Ruggles vs. Illinois, 108, U. S. 536, it was held

that a provision of a railroad charter conferring power upon the directors of the road, in the language following, did not amount to a contract:

> "The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company, not inconsistent with the laws of this state. * * *
>
> "To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage, shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided. * *
>
> "Section 32. The legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent. per annum on the capital actually paid in; nor, unless on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company from all sources for the year then last passed shall have exceeded an annual income of fifteen per cent. upon the capital of the corporation actually paid in."

Mr. Chief Justice Waite in holding that, notwithstanding this charter, the State could regulate the matter of rates, said:

"Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction, as the public interests, may seem to require. As was said by Chief Justice Taney, speaking for the court, in Charles River Bridge vs. Warren Bridge, 11 Pet. 547: 'It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created.' This is an elementary principle."

To the same effect are:

Railroad vs. Illinois, 108 U. S. 541.
Ruggles vs. Illinois, 108 U. S. 526.

In Stone vs. Trust Company, 116 U. S. 307, it was contended on behalf of the railroad that the following provision of the charter exempted it from further regulation of its rates by the state:

"That it shall be lawful for the company hereby incorporated, from time to time, to fix, regulate and receive the toll and charges by them to be received for the transportation of persons or property on their railroad or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

In holding such provision not to amount to a contract, this Court said:

"This power of regulation is a power of government, continuing in its nature; and if it can be bar-

gained away at all it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank vs. Billings, 4 Pet. 560 (29 U. S. bk. 7, L. ed. 955), 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' * * * * The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention."

In Stone vs. Railroad, 116 U. S. 347, it was held that the grant of power to the president and directors of a railroad to adopt and establish such rates for transportation as they might deem proper, and to alter and change the same at pleasure, did not amount to a contract, but left the state free, within the limits of general authority, to act as to the reasonableness of such rates. In this case (on page 352) it was held that the provision in a charter, that in fixing rates there should be no discrimination in favor of any other road, did not bring into that charter the rate clause in charters subsequently granted fixing maximum rates, so as to exempt such railroad from the operation of the railroad supervision act of Mississippi.

In Banking Company vs. Smith, 128 U. S. 174, the following provisions in the charter were relied upon as constituting a contract:

"The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement for every one hundred miles; and five cents per mile for every hundred miles; and five cents per mile for every passenger; provided, always, that the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such terms as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers."

Mr. Justice Field, in delivering the opinion of the court denying the contract, said:

"It does not matter, in the present case, whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company

may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. *It contains no stipulation, nor is any implied, as to any future action of the legislature.* If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature has, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated." (The italics are ours.)

In the course of the opinion, the learned justice takes occasion to refer to the fact that the theory prevailed at the time the charter was granted (1833), that a railroad was subject, like an ordinary wagon road, to the use of all persons who are able to place the necessary conveyances upon it. While the company was the owner of the roadbed, any other person could run cars upon it upon payment of established tolls.

The same theory, under almost similar charter provisions, inheres in the charter of 1850, under which the Louisville Company is here claiming a contract with the state of Kentucky. We think that the case cited is analagous to and governs the case at bar.

In the two cases of Railroad vs. Minnesota, 134 U. S.

418, 467, it was held that a charter provision giving power to the directors of the company to make rules as to rates of toll does not constitute a contract that it shall have the right, for all future time, to prescribe its rates of toll, which are thereby controlled by the legislature of the state.

In Smyth vs. Ames, 169 U. S. 466, it was contended that, as to the Union Pacific, the state had no right to control the rate, because under a provision of an Act of Congress creating the road it was provided, as follows:

> "Whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of 5 per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law."

In holding that this was not the result, this Court said:

> "Undoubtedly, Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the states through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits."

In Turnpike vs. Sandford, 164 U. S. 578, it was held that a grant to each of two new corporations, of the powers, rights and capacities which had been granted to a corporation which they succeeded, and to the property which is divided between them, does not confer on the new companies the exemption conferred upon the original company from legislation changing the rates of toll; and that, if a contract with a state relating to the exercise of franchises is suspectible of two meanings, the one restricting, and the other extending the powers of a corporation, that construction should be adopted which works the least harm to the state. That case came up on writ of error to the Court of Appeals of Kentucky. The State Court (14 K. L. R. 689) held that although the act fixed a maximum rate of toll to be charged, this did not constitute a contract between the State and the Turnpike Company depriving the State of power thereafter to modify or regulate the rate of toll. While this Court did reverse the Kentucky Court of Appeals, the reversal was not on account of any disagreement upon the part of this Court with the State Court on that proposition, but wholly because the rate which the State had fixed was held to be unreasonable.

In Commonwealth vs. Covington Bridge Co., 21 S. W. 1042, a contract prohibiting the state from fixing rates was contended for, under the following charter provision of an act of the State of Kentucky, dated February 17, 1846:

> "That the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods,

carriages, or animals of every description or kind: provided, however, that the said company shall lay before the legislature of this state a correct statement of the cost of said bridge, and an annual statement of the tolls received for passing over the same, and also the cost of keeping said bridge in repair, and of the other necessary expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of said bridge shall not exceed 15 per cent. per annum, after the proper deductions are made for repairs and charges of other descriptions. Toll gates shall be kept, and tolls received at each end of the bridge, and the rates of toll shall be posted up in some conspicuous place where toll is demanded. On the 5th of February, 1861, the capital stock was increased to $1,000,000, and the company also authorized to issue one-half of the amount in preferred stock, provided 'that it shall be lawful to prefer such stock to the extent of fifteen per cent. per annum, and no more.' "

In a well-considered opinion reviewing many authorities, the Court of Appeals of Kentucky, in ruling against the contention of contract, sail:

"It is not pretended that the charter of the appellee, the Cincinnati & Covington Bridge Company, can be repealed, because there was no such power reserved in the grant, and the general law now found upon the statute book of the state, where this power is expressly reserved, was not enacted until after the grant was made; nevertheless, this power to regulate tolls over public ways, and in this class of cases, being the exercise of a governmental

power, as must be conceded, its exercise may be resumed at any moment, unless by contract the state has surrendered it. We have found no decision of the Supreme Court, since this question as to the right of a state to surrender these governmental powers has been mooted, where private property has been devoted to public use under legislative grants, in which that court has construed the grant as containing stipulations precluding the state from exercising any control over the rates or charges the citizen is required to pay for its use. There are many changes in the condition of the country, as well as its people, during a period of 40 years. What may have been a reasonable rate of toll or income upon such investments 40 years ago would now be deemed exorbitant, and before this court should hold that the corporation had the right to a net income of 15 per cent. per annum, to be paid by the public so long as the structure exists, or that this power of government had been delegated to those whose interests were adverse to the public, it should entertain no doubt of the purpose of the legislature to surrender by the words of the grant all future legislative control over the subject matter. The capital stock of this corporation at the time its charter was obtained, and the right to charge these tolls given, was only $300,000, and has been increased, from time to time, to $1,785,000, upon which sum the right to an income of 15 per cent. per annum is claimed, although the amendments by which this increase of stock was made were enacted, as well as other amendments, since the passage of the general law reserving to the state the power to alter or repeal corporate grants."

By express decision in this case, the case of Hamilton vs. Keith, 5 Bush. 458, which may be relied upon by the Louisville Company, was overruled. In the Keith case, by Section 6 of the charter of the Covington & Lexington Railroad, dated February 6, 1854, certain provisions were made as to rates. No right was reserved to the state to alter, amend or repeal the charter. Subsequently, on February 16, 1869, the sixth section of the previous charter was repealed and a different tariff of way freights established. Hamilton tendered a lot of freight and demanded its transportation at the rates established by the last act. This was refused and suit was brought. The state court held the Act of 1869 to be unconstitutional, as violating the obligation of the contract of 1854. This decision, in this regard, is expressly overruled in the Covington Bridge case. On writ of error, it is true, the state court was reversed in the Covington Bridge case, 154 U. S. 205, but not because there was any difference of view as to the disposition of the contract contention, but wholly because the said act was an intereference with interstate commerce, as the bridge spanned the Ohio River between Covington and Cincinnati.

In Railroad vs. Miller, 132 U. S. 75, the Pennsylvania Railroad contended for an exemption from consequential damages resulting from the construction of its railroad under a charter grant, simliar in principle to that invoked by the Louisville Company. This Court, in holding that there was no contract, said:

> "Nor will the exemption claimed from future general legislation, either by a constitutional provision or by an act of the legislature be admitted to exist unless it is expressly given, or unless it follows

by an implication equally clear with express words. In the present case, the statutory provisions existing prior to the Constitution of 1873, in favor of the defendant, can not be properly interpreted so as to held that the state parted with its prerogative of imposing the liability in question, in regard to future transactions."

In Winchester Turnpike Company vs. Croxton, 98 Ky. 739, 33 L. R. A. 189, the sole question for decision was whether an act of the legislature of Kentucky limiting the tolls to be charged by the turnpike company violated its contract with the state. The provision here relied upon as constituting a contract was contained in a charter granted in 1834, not subject to alteration, amendment or repeal, and was as follows:

"Section 15. It shall be lawful for the president and managers * * * to collect and receive of and from all and every person or persons using said road the tolls and rates hereinafter mentioned, and to stop any person riding, leading or driving any horse, etc., * * * until they shall have paid toll agreeable to the following rates, to-wit: For every twenty head of sheep, hogs or other small stock, six and a fourth cents, etc.

"Section 21. And if at any time it shall appear that the clear income and profits will not yield a dividend of six per centum per annum on the capital stock so expended from the time of investing the same, then it shall and may be lawful for the president and managers to increase the toll herein allowed so on each and every allowance thereof as will raise the dividend up to six per centum per annum;

and if at any time it shall appear by the said abstracts that the said income and profits will yield a dividend exceeding twelve per centum per annum, then the said tolls shall be reduced so as to reduce the dividend down to twelve per centum per annum."

Subsequently, in 1893, by an act of the legislature, a different schedule of maximum rates was fixed for turnpike companies. In holding the provision relied upon not to constitute an irrevocable contract, the state court, in a well-considered opinion, said:

"The determination by the state that for to-day, or for an indefinite time in the future, the charge of six and a fourth cents for every twenty head of sheep driven through the gates of the company would be a reasonable charge, is not a final settlement or determination of what may be reasonable sixty years hence; and the exercise once by the state of the right to fix a rate at what was then deemed reasonable is not in itself exhaustive of this power. Admitting the rate fixed is reasonable—the legislative will so declares—but what is reserved? What is it that the public is interested in reserving? Manifestly that the rate should continue reasonable, and what was to be deemed reasonable in the future the legislature was to decide, whenever it chose to act, just as it exercised the right in the first instance. It is precisely as if in front of the company's charter the state had written, 'I grant you the right to charge certain fixed rates, and these may be increased or diminished within certain limits according as you make six or twelve per centum per annum on the

capital invested. These rates and profits are reasonable, but I go no further. I do not say I shall always regard them reasonable. I reserve, as I do not expressly barter away, the power to provide reasonable rates for the traveling public of the future."

"If the state had meant otherwise it would have said that the rates as fixed herein shall remain unchanged forever, and, to sustain appellant's contention, these important words must be interpolated into the charter; and this is true, not only with reference to the special rates of toll fixed, but to the specified minimum and maximum rates of interest as well. The fixing of the toll and the rates of interest allowable was but an expression of the legislative will that such tolls and such rates of interest were, for the time being, reasonable and lawful; and there is no promise, expressed or implied, that further and future regulation is finally abandoned by the state.

* * * We are convinced that the General Assembly intended, by the charter in question here, merely to indicate the rates of toll then supposed to be reasonable, and to provide for a like reasonable profit, in the way of interest, without intending to abandon forever its power and to exercise control over and limit the rates of toll and the profits of the company in the future. The doctrine that the state reserved to itself its governmental functions and powers of further regulating the property and franchises of corporations created by it, where the public were affected, was announced as early as in 1830 in the case of Providence Bank vs. Billings, 4 Pet. 514, and we have no reason to believe that the representatives

of the state contracted in ignorance of this principle."

In Ragan vs. Aiken, 9 Lea 610, it was contended that the following provision of a railroad charter amounted to a contract, preventing the state from further changing the rates to be charged. (We quote from the charter, Section 14, Act of Tennessee, 1845, chartering the Nashville & Chattanooga Railroad as set forth on page 615 of the case):

> "That section confers upon the company the exclusive privilege to carry freight and passengers over the road, and adds: 'Provided, that the charge for transportation or conveyance shall not exceed 35 cents per hundred pounds on heavy articles, and 10 cents per cubic foot on articles of measurement for every hundred miles, and 5 cents a mile for every passenger; and provided also, that the said company may, when they see fit, farm out their right of transportation on said road subject to the rate abovementioned.'"

In holding that this provision did not come to an irrevocable contract, the court, in a well-considered opinion, said (page 617):

> "Railroad companies, as quasi-public corporations exercising franchises granted in consideration of accommodations afforded the public, are required, and may be compelled, by the courts, to afford reasonable and impartial facilities of transportation. Their charges, when not regulated by charter or by statute must be reasonable, and the courts will determine whether their charges are reasonable: Munn

vs. Illinois, 94 U. S. 113, 133; Chicago vs. Iowa, 94 U. S. 155; Reg. vs. Grand Junction Co., 4 A. & El. 16. If only a maximum limit of charge be fixed by charter, the reasonableness of other charges within the limit may be tested in the courts. If the charge for each service be fixed by law, or if the intention of the legislature is clear to only allow certain specified fares or tolls, leaving other cases unprovided for, the company must abide by its contract. * * *

"We are of the opinion that no such intent appears in the language of our statute; that the object was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges, within that limit, to the companies, subject to the rules of the common law and the regulating power of the courts and the legislature."

In Water Company vs. Fergus, 178 Ill. 571, 53 N. E. 363, the Supreme Court of Illinois said, in passing upon a similar claim with reference to a contract for water rates:

"We do not think the adoption of the alleged ordinance by the village of Rogers Park, and the acceptance and fulfillment of the conditions thereof by the appellant company, vested it, as with property right, with the power to demand that the rates named in the ordinance should remain fixed and unchanged for the period in which it was licensed to occupy the streets of the village, or that the ordinance and its acceptance constituted a contract, or that any contract obligations arose by reason thereof. * * * The village exercised the power by incorporating

in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of 30 years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable * * * * Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same; that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the state to serve the public. Whenever the evil of extortion exists, the power to eradicate it may be successfully invoked. In the exercise of that power by the state, or by a municipality, exercising the power by delegation from the state, there is no admixture whatever of any contractual element; nor does the corporation against whom the power is exercised obtain any vested property interest or

property right in the scale of rates deemed at any particular time to be reasonable maximum prices for the article to be supplied by the corporation."

We believe that, in the main, where this Court has held a contract to exist with reference to any surrender by the state of any part of its sovereignty to a corporation or person discharging a public duty, some provision amounting to an express exemption of the company or person from the future exercise of the power will be found. Such a provision is found in Gordon vs. Appeal Tax Court, 3 How. 133.

There the provision was:

"That upon any of the banks in this state complying with the condition of this act, the faith of the state is hereby pledged not to impose any further tax or bonus upon the said banks during the continuation of their charters under this act."

In the case at bar, Section 18 of the charter relied upon expressly provides only a maximum. There are no words excluding the state from changing this maximum or fixing in the future, with the change of circumstances, a reasonable rate within it, nor are there any words exempting the road from the future control of the state in regard to its rates. The provision is very similar to that of the Nashville and Chattanooga charter reviewed by the Supreme Court of Tennesseee in 9 Lea, *supra*. Moreover, Section 18 of the charter shows the contemplation by the state of facts such as are contemplated in the charter reviewed in the case of Banking Company vs. Smith, 128 U. S. It contemplated the creation of a railroad on the order of a turnpike company. As shown in

its bill, the main line was not constructed until about 1859. The condition with reference to which a maximum schedule of rates and tolls was fixed as reasonable for the time being in Section 18 has never existed, but, on the contrary, the theory of a toll road has been wholly abandoned. It is not claimed in the bill that any such road as was contemplated in Section 18 was constructed.

It will be observed that Section 18 of the charter of the Louisville Comapny confers upon the president and directors of the company "power to charge for tolls * * * any sum not exceeding the following rates" (upon certain specified articles), and "for persons and any species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

There is no word or expression in this or any other section of the charter, which indicates the intention of the legislature to make irrevocable the grant to charge the specified rates. In the absence of any rate being fixed in the charter, the company would have had the right to charge a reasonable rate. The rates named in the charter amount to the expression of the legislative opinion of what was regarded as reasonable.

In arriving at the legislative intent it will be useful to consider the language used in Section 18 in reference to taxation of the property of the company and the construction of parallel lines. It is there provided that the property of the company "shall never be taxed beyond the rate of tax imposed on real estate, estimated upon the prime cost of the proposed works; nor will the legislature of this Commonwealth, for the space of thirty years, authorize any other railroad to be laid down,

on a parallel line, with the one located with this company, extending from Louisville to the Tennessee line, approaching nearer than ten miles."

By this grant it was intended to give immunity from taxation, beyond a certain rate, for all time, and to assure the company that no parallel road should be constructed for thirty years. It certainly seems strange that the legislature, having used these strong expressions indicating a purpose to stay its hands upon the subject of taxation, and the chartering of competing lines, should have also intended to bind itself never to interfere with the rates named in the charter, and yet failed to use like expression of its purpose. It declares that it will "never" exceed a certain rate of taxation, and that it will not, for "thirty years," charter a competing line, but it only declares, as to rates, that the company has authority or power to charge certain sums. Further the charter is silent. It is certainly fair to assume that if the legislature had intended to bind the state for all time, as to rates, it would have declared its purpose in plain and unmistakable terms. The use of these terms by the legislature in Section 18 shows that it fully comprehended the effect of its language, and that where it was intended to bind the state, appropriate expressions were used.

We submit that it would do violence to the legislative intent to construe as irrevocable this simple grant to collect certain rates.

That the manifest intention of the charter was only to establish what was then deemed to be a reasonable tariff of rates, appears, we think, from not only the charter as a whole, but from the provisions expressly relating to rates, and which are relied upon to constitute a contract. A limitation was put upon the power of the

company in charging toll, but not upon the sovereign power of the state to change and regulate the rates as the public interests might demand. The language of the charter is:

> "They (the directors) shall have power to charge for tolls and the transportation of persons, merchandise and property, of any kind whatever, transported along said railway, any sum not exceeding the following rates, to wit: On all goods, merchandise or property, for every one hundred pounds transported over twenty miles, and under fifty miles, three and one-half mills for each mile; and for persons and every species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

We here have a power conferred upon the company to charge any rate within a maximum for a haul over twenty miles and under fifty miles. Nothing is said with reference to a haul under twenty miles, or over fifty miles. With regard to such hauls there could hardly be a doubt that only a maximum was fixed.

The language is that:

> "They (the directors) shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

This is a mere inhibition upon the company to charge rates exceeding a certain limit. If an irrevocable contract, to govern for all time, had been intended by either party, it can hardly be believed that such loose

and indefinite language would have been used. The rates would have been made more specific, or, at least, they would have been made to apply to the entire road, and not limited to a haul between twenty and fifty miles. If a contract had been intended, it would have been expressed in the charter itself, and not by a mere reference to the maximum charges referred to in the charter of the different companies. That the intention was merely to make a regulation of the rates for the time being, then considered reasonable, is made more manifest when regard is had to the charter of the Lexington & Frankfort Railroad. It is evident that that railroad was intended to be run on the order of a toll turnpike. In reference to rates it speaks only of lump sums for a haul, without reference to distance. The provision is:

> "They shall have power to charge for tolls and the transportation of goods, etc., * * * any sum not exceeding the following rates, to-wit: For transportating, any distance, single packages weighing less than one hundred pounds, twenty-five cents, and at that rate, if such package weighs more than one hundred pounds."

Again, that charter not only fixes the maximum, but also the minimum of certain rates. It continues:

> "For transporting goods, produce, merchandise or property of any kind, not less than three and one-half mills, nor more than four mills, per hundred pounds' weight, per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile."

Then, after making a minimum charge, but no maximum charge, for coal, it proceeds to except divers and sundry articles from the rates established, and with reference to these excepted articles it reads:

> "The board of directors, or their agents, shall be, and they are hereby, authorized to contract specially for their transportation upon such terms as the parties interested may agree upon; provided, such rates shall in no case exceed 15 per cent over the rates allowed to be charged for heavy merchandise or produce."

We think it is evident, from these provisions, that the intention was merely to fix, as far as the rates were specified, a schedule of reasonable rates. If the parties intended a contract, we fail to see any reason why the state should have limited the railroad as to a minimum rate, or why the railroad should have desired such a limitation.

Again, if the parties understood that they were contracting, then, with reference to the greatest part of the traffic, no rate whatever was fixed, but the railroad and its patrons were left to agree upon the rate. It is hardly intelligible that a contract of such moment would have been so loose and indefinite in its provisions. Again, if a contract was made, as contended by the road, fixing the maximum, so also was a contract made fixing the minimum rate to be charged by the road. According to the allegations of the bill, the road has never charged even the minimum rate, but has continuously violated its contract in this regard, if it be a contract. If a contract, we fail to see upon what principle the railroad is privileged to violate or abandon such provisions as do not

suit it, and yet compel the observance by the other party of such other provisions as it considers to its advantage. We think the abandonment by the company of the schedule of rates shows that it never understood or considered the provisions now relied upon to constitute an irrevocable contract. The alterations in the rates and subsequent regulations in reference thereto by the State show that the State never understood the matter now relied upon to be a contract.

We, therefore, contend that Section 18 did not make an irrevocable contract with the State which will preclude it to the end of time (the charter of the Louisville Company being perpetual) from preventing this railroad system, which is almost a monopoly in the State of Kentucky, exacting from the public extortionate rates and charges. If, however, such a contract was created by Section 18, we claim that it has been abandoned by the railroad.

In 1856, the State of Kentucky passed a general law providing that all charters and grants thereafter should be subject to alteration, amendment and repeal, as set forth in the appendix to this brief. After this general law, the Louisville Company received from the State of Kentucky numerous amendments to its charter enlarging its right and increasing its capital and affecting its rates. Under the charter of 1850, the capital of the company was $3,000,000. It has since grown to be $6,000,000. Under the charter of 1850, the company was to construct a line from Louisville to the Tennessee line, in the direction of Nashville, and embracing a railroad mileage of 139.88 miles, as stated in the bill of complaint. It has since constructed and purchased and now operates in Kentucky about 1,300 miles, and in its entire system

about 4,000 miles. The population of Kentucky in 1850 was 982,405; in 1900 it was 2,147,174.

We have set forth in the appendix to this brief the provisions of the amendments of the charter of this company, which we think have a bearing upon the construction of its charter touching the matter now considered. It is our construction of these amendments that, even if Section 18 of the original charter created a contract touching its rates, it has since surrendered this contract by asking and receiving other privileges and submitting to be controlled by the State with reference to its schedule of rates; at least, they show that the State never supposed it was contracting away this important power. As all of these amendments were granted under the general provision saving to the State the right of alteration, amendment or repeal, the road can no longer claim an irrevocable contract, and especially is it estopped from any such claim in view of the following uncontraverted allegations of appellant's answer (pages 76 and 77 R.)

> "Defendants further say that Sections 190, 195 and 196 of the Constitution of the State of Kentucky, adopted September 28, 1891, provide as follows:
>
> "190. No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution.
>
> "195. The Commonwealth, in the exercise of the right of eminent domain, shall have and retain the same powers to take the property and franchises

of incorporated companies for public use which it has and retains to take the property of individuals, and the *exercise of police powers of this Commonweath shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals.*" (Italics ours).

"196. Transportation of freight and passengers by railroad, steamboat or other common carrier shall be so regulated by general law, as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common law liability."

And that Section 570 of Chapter 32 of Kentucky Statutes provides as follows:

"570. No law shall be passed for the benefit of, or in the interest of, any corporation heretofore created or organized by or under the laws of this State, or any other State; nor shall any corporation avail itself of the provisions of this Chapter unless such corporation shall have previously, by a resolution adopted by its board of directors and filed in the office of the Secretary of State, accepted the provisions of the Constitution of this State; and such resolution or a certified copy thereof, shall be evidence for and against such corporation."

"Defendants further say that complainant desiring to avail itself of the rights and privileges accorded common carriers by the Constitution and statutory laws of the Commonwealth of Kentucky, did, in pursuance of a resolution adopted by its

board of directors, and which it filed in the office of the Secretary of State of the Commonwealth of Kentucky on the 14th day of July, 1902, accept the provisions of said Constitution and of said laws. Said acceptance and said resolutions so filed are in words and figures as follows, to-wit:

'At a regular meeting of the Board of Directors of the Louisville & Nashville Railroad Company, duly held pursuant to due notice and adjournment at the office of the Company in the City of New York, on Friday, the 11th day of July, 1902, a quorum being present, the following resolutions were duly adopted by the affirmative vote of every Director present:

'RESOLVED, That the Louisville & Nashville Railroad Company hereby accepts the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891.

'RESOLVED, That the Louisville & Nashville Railroad Company hereby accepts the provisions of Chapter 32 of the Kentucky Statutes, being the Act adopted April 5, 1893, with the amendments thereto.

'RESOLVED, That a copy of these resolutions be attested under the seal of the corporation by the Chairman of the Board and by the Assistant Secretary, and that the same be filed in the office of the Secretary of State of Kentucky.

'A true copy from the minutes.

AUGUST BELMONT,
Chairman.

'Attest: C. W. MORRISS,
Assistant Secretary.'

"By said act upon the part of complainant's board of directors, and the filing of same, together with said acceptance, in the office of the Secretary of State, complainant thereby abandoned and relinquished all rights and privileges contained in the said charter and amendments thereto, if any it had, in conflict with the provisions of the Constitution of the Commonwealth of Kentucky and of the laws enacted by the General Assembly of said Commonwealth under said Constitution, and since said acceptance complainant has repeatedly availed itself of the provisions of said Constitution and laws and and is and was when said Commission's order was made, subject to and governed by, and under the control of, the present Constitution of the State of Kentucky, and under the laws enacted thereunder, and all the statutes governing and controlling the operation and conduct of railroads in the State of Kentucky."

OPINION AND ORDER OF THE COMMISSION.

The opinion and order of the Kentucky Railroad Commission which gave rise to this litigation is set forth in full and will be found on pages beginning with page 50 and ending with page 69 of record.

The questions raised with respect to this opinion and order are essentially questions of fact, and cannot be determined by this or any Court until the evidence already introduced, and to be hereafter submitted to the Special Master, has been fully heard and considered, and his report thereon submitted to the Court. This opinion and order show conclusively that the most

careful consideration of the subject matter under investigation was given by the Commission; that every requirement of the law was carefully followed. It will be further observed from a reading of this opinion and order that there has been no hasty or radical reduction in freight rates; in fact, instead of there being a horizontal reduction of all freight rates, this opinion shows that the Commission found, after a most lengthy and careful investigation, that one section of the State of Kentucky was being served by the Louisville Company and the Cincinnati Company on a mileage scale of rates at least 25 per cent less than the other sections of the State were being served; consequently, the order of the Commission was mainly aimed at an equalization of rates, in order that the shippers of Kentucky might be permitted to have transported to them such commodities as they desired transported from distributing points like Owensboro, Henderson, Louisville, Covington, Lexington and Newport, upon a basis of rate adjustment, which would not be a discrimination against the shipper in favor of any such points of distribution as indicated.

This Court in Seaboard Air Line R. R. Co. vs. Florida, 302 U. S. 269, said:

> "Even if the total receipts by the latter company from local freight rates were insufficient to meet what could properly be cast as a burden upon that business, such insufficiency would not justify it in an inequality of rates between different parts of the State, in one part too high and in the other too low. The State might properly insist that there should be equality in the rates,—the conditions being the same,—and, if nothing more was accomplished by the order of the Commission than to establish

such equality, we cannot hold that the judgment of the Supreme Court was erroneous."

Whether the conclusions reached by the Commission as set forth in its opinion and order will be borne out by the facts when the evidence has been adduced, is a question not arising upon this appeal. The conclusions so reached stand uncontradicted, and must be presumed to be just until otherwise shown by the carriers challenging their correctness.

With respect to that portion of the Commission's order reducing appellee's mileage scale of rates and approving its classification, we find by reference to appellants' answer at page 96 of record the following uncontradicted allegations, which we think meet the objections urged to this part of the order, to-wit:

"Defendants say that complainants and all other railroad carriers have heretofore adopted a plan for making rates. In accordance with this plan or basis, the many thousands of articles which they are required to transport, and for the transportation of which rates must be made, are classified or grouped in such a way as to bring them together into one or the other of said classes or groups in order that each class or group may be subjected to the same charge for carriage. A rate is then fixed for each class or group, this being done to facilitate the making of rates and is but one of the elements and a part of the plan or basis for making same. As shown in complainant's local freight tariff designated 'Table A' and in 'Kentucky Railroad Commission's Standard Tariff No. 1, applicable to the Louisville & Nashville Railroad Co.,' complain-

ant had, therefore, adopted certain classifications or groups, to-wit: numbers 1, 2, 3, 4, 5, 6 and letters A, B, C, D, E, H, F, I, L, M, and N. Under these classifications or groups about three thousand five hundred (3,500) commodities are distributed and the rate upon each class or group is then fixed as shown in said tariffs, thereby fixing the rate for the transportation of each commodity assigned to the several classes or groups. Defendants did not change complainant's plan or basis for making such rates, but, upon the contrary, adopted and approved the same, as the most convenient form and method of making and fixing rates, and the plan or basis thus adopted is nothing more nor less than making and fixing the rate."

Likewise, as regards appellee's objection to that portion of the order adopting appellee's commodity rates, or rates lower than shown by their local tariff or class rates, as the maximum rate, wherever such commodity rates are found to be lower than such class rates, we find the proper answer to same on pages 88 and 89 of defendant's answer, as follows:

"Defendants aver that under the circumstances it was entirely proper for the Commission to order the commodity, or such other rates as were lower than those fixed by said Railroad Commission's Standard Tariff No. 1, to remain in effect as maximum rates until otherwise ordered by the Commission; that complainant had established and maintained these rates as just and reasonable, and that they were no more than just and reasonable under the circumstances. In addition to its own judgment

upon this proposition the Commission was and is fortified by the complainant's judgment, evidenced by the fact that complainant made and fixed said rates as just and reasonable; that complaint has not increased these commodity or lower rates, or attempted to do so, nor has it made any application to the Commission to have the order changed with reference thereto. Defendants deny that said commodity or other rates, or any of them, are lower than similar rates in force upon other roads, competitors of complainant in business. Defendants deny that that portion of their said order as undertakes to prohibit complainant from increasing the existing commodity rates, or rates in tariffs other than its 'Table A, Local freight Tariff,' from what they are, to said Commission's maximum rates on the classes to which such commodities belong, is either null or void. Defendants deny that Exhibit No. 3, filed with the bill of complaint, contains a true comparison of complainant's 'Table A' rates with the rates in Kentucky Railroad Commission's order of July 20, 1906, showing for all distances (a) complainant's present rates (b) the new rates prescribed by said Commission, and (c) the reduction, should the order of said Commission become effective. Defendants aver that complainant's said 'Table A' tariff rates does not show all rates actually charged by complainant and, while it is true that defendant's order was intended to be a reduction of 20 per cent of the rates shown by complainant's 'Table A, Local Freight Tariff between all stations for distances of 20 miles or less, and of 25 per cent of the rates shown on that tariff between all stations for distances over

20 miles, yet inasmuch as said 'Table A' tariff, does not show all the rates in effect upon complainant's lines, to and from all points in Kentucky, said re- not show all the rates in effectupon complainant's line to and from all points in Kentucky, said reduction of 20 per cent and 25 per cent was not, in fact, a reduction to that extent, of all of complainant's rates actually in effect."

Appellee's theory is that the Commission had no authority to determine that a charge in excess of an existing rate, is extortionate, and that its power is limited to reducing such existing rates as may be found to be extortionate.

The law provides:

"When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been, guilty

of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered."

Assuming that a complaint has been filed with the Commission alleging that the Louisville Company has exacted a charge for the transportation of lumber, 15 cents per hundred, logs 10 cents per hundred and cross ties 20 cents per hundred, from Middleboro, Kentucky, to Lebanon, Kentucky, and it is alleged that such charge is extortionate, and that after notice and full hearing the Commission determines that lumber, logs and cross ties should be assigned to the same class and bear the same rate, that the maximum rate for each shall be 10 cents per hundred and that any charge in excess thereof is extortionate.

Can it be said that the Commission has exceeded its authority and that the entire order is void? Must it be said that in order to remedy an evil in any particular, it must be found to extend to every particular? According to appellee's contention, the Commission must find that there has been an extortionate charge in the case of each and every commodity named in the complaint. But the strictest and most technical construction of the act will not permit of such a conclusion. The act provides that when complaint of extortionate charges is made, the Commission shall determine the matter as speedily as possible; that if it finds that extortion has been practiced, then it may fix a reasonable rate, which the railroads shall not exceed. In the above example complaint of extortion was made and, upon hearing, found

to be true; and the Commission determined the matter by fixing a maximum rate, to apply in all cases for like services thereafter rendered. The act does not require, nor is it open to the construction, that extortion must be found in each specific instance; on the other hand, the Commission, by putting logs in the same class, to bear the same rate, with lumber and cross ties, say in effect that the transportation of logs and the transportation of lumber and cross ties are like service, and hence bring themselves within the statute providing a maximum rate to apply to all. A case similar to the illustration cited came before the Commission as part of the original complaint upon which the order herein complained of was based, and was decided by the Commission December 7, 1905; the full opinion and order will be found in the record beginning with page 137 and ending on page 140. This order has ever since been and still is being, observed by all the complainants.

Rate-making is indeed legislative in character, but its results are closely identified with the intricate machinery of business, involving many interests, affecting many persons; and, consequently, the Court in dealing with a matter of such vast yet such delicate proportions has never hesitated in the various rate cases that have heretofore been considered, and should not now hesitate, to adopt a construction that will facilitate commerce and not hamper it. If, as a matter of fact, there have been extortionate charges in a great number of cases, of which complaint has been properly made, why should the interests of the public be prejudiced and even penalized, and the object of the act thwarted, because in one or more instances the rates are found to be more than reasonable? What the appellees would expect to gain by their contention, in the illustration cited, would be a con-

tinuance of the extortionate rate until another complaint, which made no mention of the log rate, was filed and passed upon; a most inequitable and absurd proceeding.

The inevitable result of a rule, such as the appellees contend for, would be that for every commodity whose rate was complained of, a separate complaint would have to be made. No elaboration is necessary to show the extended delay, the incalculable expense, and the increased confusion that this branch of commerce would be subjected to; and, futhermore, even if appellee's contention were upheld, eventually the rate on lumber and cross-ties would be fixed at 10 cents maximum, and if at any time the railroad increased the log-rate it would be reduced to the same figure, so that the ultimate results of the two contentions are the same, except that one determines the matter as speedily as possible, and the other burdens it with unnecessary delay.

But the appellees contend that unless the Commission reduce the log rate, in the example first instanced, the entire order is void. Granted, for the sake of argument, that the premises be true, the conclusion by no means follows. If the Commission's order be regarded as a judicial order, then under the rule of this and every other court only so much of it as the Commission was unauthorized to make would be void; if it be regarded as a legislative act, then under the uninterrupted decisions of this Court only so much as is *ultra vires* would be void, and the remainder would stand as a valid act. (Berea College vs. Ky., decided Dec. 9, 1908; Dec. 1, Advance Sheets U. S., 33 Ragan vs. Trust Co. 154 U. S. 362.)

As long as conditions remain as they are it would be presumed that rates which are not lower than the rates voluntarily fixed by the railroad company are not unreasonably low. If conditions change so as to make

these rates unreasonably low it is to be presumed the Commission would, upon application, authorize them to be increased. Besides, it cannot now be assumed that the appellees will, at some future time, desire to increase these rates. For the same reason that this Court (in McChord, &c., vs. L. & N., &c., 183 U. S. 483, *supra*,) held that the railroad company was not entitled to an injunction before the Commission had fixed any rates, it must hold that injunction to restrain the Commission from prohibiting the company from increasing existing rates does not lie until conditions have arisen which make it necessary for the company to make such an increase.

It will be recalled that this Court, in McChord, &c., vs. L. & N. Railroad, 183 U. S. 498, called attention to the fact that the various Kentucky Statutes definng the powers and duties of the Railroad Commission must be read as in *pari materia* with the Act of March 10, 1900, because they are parts of one system, having the same general objects in view; that Section 816 defines extortion to be, charging more than a just and reasonable rate; that Section 817 defines unjust discrimination, and Section 818 forbids undue or unreasonable preference, and Section 819 fixes the penalties, subject to the recommendation of the Railroad Commission, in advance of any indictment or proceeding by information; that *Section* 821 *makes it the duty of the Commission to see that the laws relating to railroads shall be faithfully executed, and to exercise a general supervision over the railroads of the State*; and that Section 829 makes it the duty of the Commission to hear and determine all complaints under Sections 816, 817, and 818, and to make a finding or an award. Thus, it will be seen that under the laws of Kentucky the intention and purpose of the

Constitution and the laws are that the entire subject matter of regulating railroads be delegated to the Railroad Commission, care being taken that, before the Commission shall act, either upon a complaint, or when it receives information, or has reason to believe that the laws effecting railroad corporations in their relation to the public are being violated, due notice, and hearing be given, and that whatever determination may be reached by the Commission, such determination shall be a just and reasonable one, affecting the rights and duties of the railroads with respect to their duties to the public. Hence, we contend that the Commission, after full notice and hearing of such matters as may be brought to its attention by a formal complaint, or when it has received information, or has reason to believe, that any of these laws have been violated, cannot escape the duty of entering an order, finding, or award which, under a broad view of all the attending facts and circumstances, may be fair and just.

Moreover, it may be assumed that in the general fixing of rates for a given class, the Commission fixed its maximum rates no lower than it did fix them because certain articles in the class bore lower commodity rates, and that the purpose was to fix just and reasonable rates for the whole.

We believe that equity will not give relief from rates fixed by State authority, which complainant carrier, from its own experience and wisdom had itself fixed as adequate return for the services rendered, and in no event would a Court of Equity interfere until it was clearly shown by the evidence that there was an error in judgment upon the part of the carrier which had fixed the rates, or that an error had been committed or an injustice done to the carrier by the State's authority.

So far as the records of these cases are concerned

there is absolutely nothing to show the kind or the number of such commodity rates, the volumes of such traffic, the distance hauled, nor whether the rates so fixed were in and of themselves just and reasonable other than the admitted averment of appellant's answer that such rates are no more than just and reasonable and the Commission's order declaring that any charge in excess thereof is extortionate.

Appellees' further objections to the Commission's order that insufficient notice was given prior to the hearing by the Commission and that the Commission had no power to make a local mileage scale of rates, are without merit.

We have heretofore called attention to the fact that it is admitted by the bills that the written notices (see 113 to 119 pages record) were actually given more than ten days in advance of the hearing; that appellees appeared by counsel, filed various motions, demurrers and pleadings, the most extensive hearings were accorded, all the testimony offered was heard and considered by the Commission, and all questions were fully argued both orally and by brief before the opinion and order was promulgated.

If the Commission under the Constitution and the laws of the State of Kentucky is charged with the duty of substituting just and reasonable rates for rates found to be extortionate, it will not be denied that each individual rate may be the subject of complaint and investigation, and if one thousand separate complaints may be made to the Commission, and if they have the power to hear and determine each of these separate complaints, and having the power to determine whether

or not these separate complaints are well taken, and if so to substitute just and reasonable rates in lieu of the former rates, can there be any valid objection to the Commission investigating these one thousand complaints at either one continuous hearing or at numerous hearings provided the required ten days' notice is given? And, if this be true, a complainant or complainants have the right to challenge the entire one thousand rates in one complaint, and it will be the duty of the Commission to hear and determine this complaint, and if they have the power to do so, as regards 1,000 rates, they certainly have the power to hear and determine a complaint, in which is involved the reasonableness of five, ten, or even all the rates charged by a railroad, and to reduce them by a single order upon an allegation that all the rates are extortionate. Moreover, it will be remembered that under these laws, the Commission may order a hearing as to the reasonableness of rates without a complaint, "when said Commission shall receive information or have reason to believe" that extortionate rates are being charged. If the Commission, therefore, from whatsoever source its information may be derived, receive information or has reason to believe that any or all of complainant's rates, between points in Kentucky, are extortionate, it has the power without any complaint, to give notice, have the hearing, and if, in their judgment, from the evidence and argument heard, it is determined that any or all of these rates are extortionate, it then becomes the duty of the Commission to fix just and reasonable rates which may be charged in the future; and, in doing so, there can be no valid objection to the adoption by the Commission of the basis or plan used by the appellees and all other railroads in making their rates in the first instance. In the many rate cases before this Court during

the past 20 years, it has been brought to the knowledge of the Court time and again that the freight traffic of the railways of the United States is carried under two general classes of schedules, commonly known as "Class Tariffs" and "Commodity Tariffs." The latter has reference to schedules applicable to such articles as grain, lumber, coal, live stock, dressed beef, fertilizers, oil, etc., transported between sections of the country where these articles have attained a commercial and shipping importance which has made necessary specific rules for their transportation differing from those covering classified traffic, as well as a somewhat lower scale of rates than is applied to the latter.

Class tariffs are arranged to show the rates of the respective classes contained in the freight classifications. In the latter are found the great majority of articles carried by the railways, classified in accordance with the various elements that properly enter into the determination of freight charges; under these also are found the commodities above mentioned, and although exceptionally treated in certain sections as to rates, they are all amenable to some rule of the classification. The rate-making foundation for all commodities is seen to lie largely in the freight classification.

It is, of course, understood that there are many exceptions to the application of the general classifications. Practically all railroads publish commodity tariffs which provide special rates on certain articles which are, as a rule, lower than the rates provided for such commodities in the regular class tariffs. As before stated, such articles as grain, grain products, dressed meats, live stock, lumber, coal, iron, oil, fertilizers, etc., are usually transported under commodity tariffs in practically all parts of the country. Nearly all roads also

publish exception sheets, both local and joint, in which many articles are given a rating different from that provided in the general classification. All articles not provided with commodity rates and which are not included in the exception sheets, when moving between local points, are carried under the general classification which governs the class rates in the territory where the shipments are made.

This comprehensive and universal plan for dealing with the adjustment of freight rates was adopted by the Railroad Commission, and if the law itself under which the Commission acted was uncertain or ambiguous as to the power and duty of the Commission in the premises, which we deny, the fact that the Commission has adopted a wise and comprehensive plan for the adjustment of these rates should commend itself to the Court, for, as said in Moulton vs. Moore, 178 U. S. 76,

> "We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality or injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. (Citing.) Bate Refrigerating Co. vs. Sulzburger, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508; Wilson vs. Rousseau, 4 How. 646, 680, 11 L. ed. 1141, 1156; Bloomer vs. McQuewan, 14 How. 539, 553, 14 L. ed. 532, 538; Blake vs. National Banks, 23 Wall. 307, 320, 25 L. ed. 119, 121; United States vs. Kirby, 7 Wall. 482, 486, 19 L. ed. 278, 280."

At the time the foregoing brief was prepared, and after it had been printed, this Court handed down its decison November 30 in Prentiss and others, State Corporation Commissioners of Virginia vs. Atlantic Coast

Line Company, etc., in which our contention discussed under the heading of "Judicial Power" has again been upheld. This case is of such recent date, and is so fresh in the mind of the Court, that we deem it unnecessary to make an extended reference thereto or citation therefrom. However, in this connection we deem it proper to quote the following as bearing upon the question of Judicial and Legislative Power.

> "Proceedings legislative in nature are not proceedings in a Court within the meaning of Rev. Sts. Sec. 720, no matter what may be the general or dominant character of the body in which they may take place. Southern Ry. Co. vs. Greensboro Ice & Coal Co., 134 Fed. Rep. 82, 94, affirmed sub nom. McNeill vs. Southern Ry. Co., 202 U. S. 534. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte* Virginia, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Sts. Sec. 709, and Act of February 18, 1875, c. 80, 18 St. 318. See Upshur County vs. Rich, 135 U. S. 467. Wallace vs. Adams, 204 U. S. 415, 423. The decision upon them cannot be *res judicata* when a suit is brought. See Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362. And it does not matter what inquiries may have been made as preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He

may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. * * * * * So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. * * * * * And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come up before it as a Court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called."

Also the following, bearing upon the question of the necessity for a full hearing of the facts in order that the Court may determine whether what has been done by the Commission was, in fact, a taking of property without the due process of law.

"But this case hardly can be disposed of on purely general principles. The question that we are considering may be termed a question of equitable fitness or propriety, and must be answered on the particular facts. The establishment of railroad rates is not like a law that effects private persons who may never have heard of it till it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care."

And the Court further said:

"But the determination as to their right turns

almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a Court of their own choosing if otherwise competent. 'A State cannot tie up a citizen of another State, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own Courts.' (Citing Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, 391. Smyth vs. Ames, 169 U. S. 466, 517. See McNeill vs. Southern Railway Co.,202 U. S. 543. *Ex parte* Young, 209 U. S. 123, 165. Other cases further illustrating this point are Chicago & N. W. Ry. Co. vs. Dey, 35 Fed. Rep. 866. Northern Pacific Ry. Co. vs. Keyes, 91 Fed. Rep. 47. Western Union Telegraph Co. vs. Myatt, 98 Fed. Rep. 335."

The reason for all this is obvious, for as said by this Court in Smyth vs. Ames, 169 U. S. 544:

> "A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State."

Firm in the conviction that these laws are valid, appellant's counsel have, out of respect to the contrary opinion of the learned counsel for appellees, entered into

the arrangement for this hearing. A proper determination, such as will be had at the hands of this Court, is of widespread and far-reaching consequence to the people and to the railroads of Kentucky. The multitude of questions to be worked out in adjusting the railroads and the public to the ideas and rules of legislative control, have not yet been fully accomplished. Upon the one hand the people may be inclined to be too harsh and too eager in the exercise of their great but hitherto dormant power; upon the other hand the railroads having fiercely combated all control, may be too impatient of any control. Justice between the opposing forces may be found when the facts are found. If in fact the Commission's rates do not bring a just return, the complainant should succeed; on the other hand, if the rates do bring a just return, the complainants should fail. It is a question to be determined by the ultimate factor of all justice—the facts in the case. The hearing before the Special Master should proceed, and we ask a reversal upon the law of each of these causes.

Respectfully submitted,

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APPENDIX.

Constitution of Kentucky.

Railroad and Commerce.

Sec. 209. Railroad commission—number—qualifications—powers—election—term of office—removal of. A commission is hereby established, to be known as "The Railroad Commission," which shall be composed of three commissioners. During the session of the General Assembly, which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate, said three commissioners, one from each Superior Court District, as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The commissioners so appointed shall continue in office during the term of the present governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this Constitution. The General Assembly may, from time

to time, change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the commissioners be all elected by the qualified voters of the state at large. And if so required, one commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in any wise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the railroad commissioners shall be regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing railroad commissioners. The General Assembly may, for cause, address any of said commissioners out of office by similar proceedings as in the case of judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said commissioners, and to impose proper penalties therefor.

Sec. 218. Penalty for charging more for short than long haul—power of commission. It shall be unlawful for any person or corporation, owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be

construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance, *Provided,* that upon application to the railroad commissioners, such common carrier, or person, or corporation, owning or operating a railroad in this state, may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state, may be relieved from the operations of this section.

General Laws of Kentucky, adopted April 5, 1893.

Sec. 821. Three commissioners—duties. There is established a department in the state gove nment to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the state. Each of said commissioners is authorized to administer oaths, and two of them shall constitute a quorum.

Sec. 822. Office at Frankfort—secretary—salary of commissioners and secretary. The office of the commission shall be at the seat of government, and they shall be provided with suitable offices, furniture and stationery by the state, and may appoint a secretary at a salary of twelve hundred dollars per year, which shall be paid by the state; each commissioner shall, before entering upon the duties of office, take an oath to discharge faithfully

the duties of his office, and they shall each receive an annual salary of two thousand dollars, and their actual, necessary traveling expenses while engaged in the discharge of their duties, which, together with the salary of the secretary, shall be paid in the same manner as the salary of the governor, except that before any expenses are paid the chairman of the commission shall file with the auditor an itemized statement of said expenses, signed by him and approved by the governor, which statement shall be filed before any warrants can be issued therefor.

Sec. 823. Election of in 1885 and every four years thereafter. At the regular election in 1895, and every four years thereafter, there shall be elected one commissioner from each of the districts hereafter designated, by the qualified voters thereof, who shall take his office on the fifth Tuesday next succeeding his election, and hold the same for four years, and until his successor is elected and qualified.

Section 824 states what counties shall compose each commission district.

Sec. 825. Report to be made by companies each year to commission—what it shall specify. Every railroad company shall, on or before the first day of September in each year, make and transmit to the commission, at its office in Frankfort, under oath of the president or manager of the company, a full and true statement of the affairs of said company as the same existed on the first day of the preceding July, specifying: (Then follows a long list of things touching which the railroad is to report.,

Sub-section 34, under Sec. 825:

34. Whether the freight or cars of such transporta-

tion companies are given any preference in speed or order of transportation; and, if so, in what particular? The commission may propound any additional interrogatories, which shall be answered by such company in the same manner as those specified in the foregoing section; and the commission shall furnish to each company, in proper time, blanks upon which to answer the foregoing and such other questions as may be propounded.

Sec. 826. Freight for foreign points to be examined by commission—duty of commission. Said commission shall examine all through freight rates from points out of this state to points into this state; and whenever they find that a through rate charge into or out of this state is excessive or unreasonable, or discriminating in its nature, they shall call the attention of the railroad officials in this state to the fact, and to urge them of the propriety of changing such rate. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission, and appeal to it for relief; and they shall receive, upon application, the services of the attorney general of this state, and into the condition, management, and all other matters concerning the business of railroads in this state, so far as the same pertains to the relation of such railroads to the public, and whether such railroad corporation, their officers and employes, comply with the laws of the state; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporation or person guilty of such violation.

Sec. 827. Examination of officers and employes by

commission—penalty for contempt. They shall have the power to examine, under oath, any person, or the directors, officers, agents and employes of any railroad corporation doing business in this state, concerning the management of its affairs, and to obtain information pursuant to this law; and shall have power to issue subpoenas for the attendance of witnesses, and to administer oaths; and any person who shall neglect or refuse to obey the process of subpoenas issued by said commisssion, or who, being in attendance, shall refuse to testify, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offense by a fine of not less than fifty dollars, nor more than one hundred dollars, or by imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

Sec. 828. Penalty for failing to make required reports or obstructing commission—jurisdiction of courts. Each officer, agent or employe failing or refusing to make, under oath, any report required by the commission, within the time required, or failing or refusing to answer fully, under oath, if required, any inquiry propounded by the commission, or who shall, in any way, hinder or obstruct the commission in the discharge of its duty, shall be guilty of a misdemeanor, and shall be fined for each offense not less than five hundred nor more than one thousand dollars; and it shall be the duty of the commission to prosecute the person offending; and the Franklin Circuit Court or the circuit court of any county through which the railroad runs, the officer, agent or employe of which has violated the provision of this section, shall have jurisdiction of such prosecution; and it shall be the duty of the Commonwealth's attorney to prosecute all indictments, actions and proceedings under this law.

Sec. 829. Complaints against companies—award of commission—proceedings upon. The commission shall hear and determine complaints under sections eight hundred and sixteen, eight hundred and seventeen and eight hundred and eighteen. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all the evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award, and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceeding had thereon as in other ordinary cases. If a trial is demanded, the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases.

Sec. 830. Improvements—when commission may or-

der—notice and proceedings. Whenever, in the judgment of the commission, after a personal examination of the same, it shall appear that repairs are necessary upon any railroad, or when, from complaint made or their own knowledge, they shall have reason to believe that the tracks, bridges, tunnels or other structures of any company are in an unsafe or dangerous condition, or unfit for public travel or that any additions to, improvements or changes in the stations or terminal facilities are needed for the convenience and security of the public, they shall give notice, in writing, to the company owning or operating such road, of the repairs, improvements or changes they deem proper and necessary, and shall afford such corporation an opportunity to be heard in reference thereto; and if the company shall neglect or refuse to make such repairs, improvements or changes within a reasonable time after such hearing, if a hearing is requested by the company, and the commission shall believe that such improvements or changes are proper and necessary after a hearing, if one is had, they shall lay the facts before the attorney general for his action, and shall report the same fully to the next legislature; no examination, request, advice or report of the commission shall, in any way, affect the duties or obligations of said company or remove it from liability.

Sec. 831. Information obtained—when not to be made public. The commission shall not be required to give publicity to any contracts, leases or engagements obtained by them in their official capacity, if the interest of any company would thereby be injuriously affected, unless, in the judgment of the commission, the public interest requires it.

Sec. 832. Favors not to be accepted from companies

by commissioners—penalty. The commissioners, nor either of them, shall, directly or indirectly, solicit or request from, or recommend to, any railroad company, or any officer, attorney, agent or employe thereof, the appointment of any person to any place or position, nor shall any company offer to them, or either of them, any place or appointment for themselves or other persons, nor shall they, or either of them, directly or indirectly, request, accept or receive any present, gift or gratuity of any kind, from any company. A violation of the provisions, or any of them, of this section shall subject the person or corporation so violating to a fine of not less than one thousand nor more than five thousand dollars, to be recovered by indictment as other penalties for violation of law are.

Sec. 833. Fees for copies of records. For a copy of any record on file in their office they shall charge and receive the same fees that are charged by the secretary of state for similar services, and shall cover into the state treasury any amount so received.

Sec. 834. Report of commission to be made annually and published. The commission shall annually, on the first day of December, make a report to the governor of all matters relating to their office for the preceding year, and such as will disclose the practical workings of the railroads in this state, and such suggestions in relation thereto as they may deem necessary and proper, and shall have printed and lay before each legislature, within the first ten days of its session, five hundred copies of their reports for the preceding two years.

Sections 816, 817 and 818, referred to above, in Sec. 829, are as follows:

Sec. 816. Extortion—what is. If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion.

Sec. 817. Discrimination—what is. If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transqortation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

Sec. 818. Preference or advantage forbidden—rules defining same quantity of freight. It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more car loads of freight shall be transported at the same time for different persons, and for each shipper a car load or more, such shipment shall be considered and taken as the same quantity of freight within the meaning of this law; and when less than a car load of freight, and over five thousand pounds, are trans-

ported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds, and less than five thousand pounds, are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight.

Sec. 819. Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin Circuit Court shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorney's fees, to be fixed by the court. Indictments under this section shall be made

only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued.

An act, approved February 14, 1856, reserving the right of alteration, amendment and repeal as to all charters and grants thereafter made.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

Sec. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution, as aforesaid.

Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter, and that this act shall take effect from its passage.

General Laws of Kentucky, previous to the Constitution of 1891.

An act in relation to common carriers, their agents and servants.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that all persons and corporations doing business as common carriers in this Commonwealth, whose rates of freight and passage are limited by law, shall be required to print and post, and keep posted, in some conspicuous place in each office occupied by them for freight and passenger purposes, a tariff of the local and way freights charged upon all such articles as are usually transported by them, and of any changes which may, from time to time, be made in such rates; and also a list of the rates to which they are limited by law, and a plain reference to the dates of the passage of all laws by which such limitations are imposed; which tariff and lists shall be signed by the superintendant or other principal managing agent of the person or corporation in whose name they are published.

Sec. 2. That any common carrier mentioned in the first section, who shall fail to cause to be printed, posted, and kept posted, as required by the first section, the tariff and lists therein mentioned, shall be subject to a fine of fifty dollars for each month during which such failure shall continue; and any superintendent or managing agent, who shall knowingly and willfully cause to be

printed and posted, as aforesaid, a false tariff of the rates charged, or of the rates to which such carriers are limited by law, shall be subject to a fine of five hundred dollars for each offense. The fines imposed by this section shall be recoverable by indictment, in the name of the Commonwealth, in any court having jurisdiction of similar offenses.

Sec. 3. Any common carrier mentioned in the first section, who shall charge and demand from the consignee of any article transported by him a greater rate of freight than that to which such carrier is limited by law, shall forfeit all right to demand or receive from such consignee any price whatever for the transportation of such article; and the consignee in such case shall be entitled to demand and receive from the agent of such carrier, in whose possession or control it may be, the immediate delivery of the article upon which such overcharge is made, the consignee paying to the carrier only such charges, if any, as may have been advanced by him on such article.

Approved March 9, 1867.

An act to prevent the railroads of this Commonwealth from charging more than the rates allowed by law. (From Supplement, Revised Statutes of Kentucky, p. 743.)

Section 1. That if any railroad company in this Commonwealth shall charge more than the rates allowed by their charters for the conveying of freight, the said company shall forfeit and pay to the person so charged double the amount of the freight bill, and the party shall have his action therefor in any court of competent jurisdiction against the company.

Approved February 17, 1866.

Acts amending the charter of the L. & N. R. R. Co., and charters therein referred to, so far as they relate to rates.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved January 17, 1856.

Sec. 2. That in addition to the foregoing sections, enacted by the state of Tennessee, and hereby enacted by the state of Kentucky, the following rights are vested and powers created, to be held and exercised by said company within the state of Kentucky: The said Louisville & Nashville Railroad Company are hereby vested with the power and authority to make agreements with any company or corporations incorporated by the laws of the state of Tennessee, to construct a railroad, in part or in whole, of the distance between Louisville and Memphis, and running in the direction of Louisville, whereby to secure mutual and reciprocal rights to the contracting parties, to run their respective roads through, from point to point, with or without change of cars or other machinery, and any other agreement which the parties may mutually make to facilitate trade and travel between the said cities of Louisville and Memphis. And the said Louisville & Nashville Railroad Company may, in arranging a tariff of tolls, make discrimination on such freight and travel as may run through from Louisville to Memphis, and from Memphis to Louisville, and such as may run in part on their road, and transhipped to another.

Sec. 3. That said company may, under the provisions of the thirteenth section of this act, from time to time, extend any branch road, and may purchase and hold any road constructed by another company, or *may agree on*

terms to receive the cars of other roads on their said road, but shall charge for the same the usual freight.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved February 6, 1858.

Sec. 6. That the Louisville & Nashville Railroad Company, for the main line and its branches, in making a tariff for freight and passengers, shall have the same authority that is vested in the Lexington & Frankfort, and Louisville & Frankfort Railroad Companies have by their charters and amendments thereto, and shall have the right to plead and rely on the same limitation for the same causes of action provided for said railroad companies.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved February 28, 1860.

Sec. 2. That said company may make arrangements with other companies for through freights and passage from distant points on such terms as they may agree from time to time.

Sec. 3. This act may be carried into effect, the provision of any other act to the contrary notwithstanding; but it is not the meaning or intention of this act to empower the board of directors for said railroad to charge a higher rate of tariff on way freight and passengers than is now established by law.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved January 8, 1864.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that when the Louis-

ville & Nashville Railroad Company shall have taken up the bonds loaned said company by the state of Tennessee, for the construction of that part of said road that is within the said state of Tennessee, the whole of the thirteenth and fourteenth sections of an act entitled, "An act to amend the charter of the Louisville & Nashville Railroad Company," approved January 17, 1856, except the first seven lines of said thirteenth section of said act, shall stand repealed; and thereafter there shall be no difference between the stock and debts of the main line and branches, nor shall separate books be required to be kept, and all stock issued shall be that of the "Louisville & Nashville Railroad Company." *Provided, however,* that this act shall first be accepted by the stockholders at some annual meeting.

Sec. 2. The holders of certificates of stock of the main line and branches may surrender the same and have them reissued as above directed.

Sec. 3. This act shall take effect from its passage.

An act for the benefit of the Louisville & Nashville Railroad Company, approved March 2, 1865.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that the charter of the Louisville & Nashville Railroad Company be, and the same is hereby, amended so as to authorize said company to increase their rate of charges 25 per cent upon the amount they are now allowed by law to charge upon freight and passengers transported from Louisville to Nashville, or *vice versa*: *Provided,* nothing in this section shall authorize the company to increase their rate of charges upon way freight and passengers.

Sec. 2. This act shall take effect from its passage and continue in force five years.

An act to amend the act incorporating the Lexington & Ohio Railroad Company.

Sec. 2. That they shall be, and are hereby, permitted to charge for transportation of passengers, a distance of three miles and under, twelve and a half cents for each passenger; and for the transportation of produce and merchandise, and other articles paying by weight, when the distance is under five miles, they may charge the same compensation as though they transported five miles.

Approved December 22, 1831.

An act to amend the charter of the Frankfort & Louisville Railroad Company.

Sec. 2. All the rights, privileges and restrictions of the Lexington & Ohio Railroad Company, as they existed under the charter of said company, from St. Clair street, in Frankfort, to the city of Louisville, except so far as they conflict with the charter of the Frankfort & Louisville Railroad Company, shall be, and they are hereby, revived and continued in full force, and transferred and covered, together with all the fee and right of way acquired and held by said company to the president and directors of the Frankfort & Louisville Railroad Company—provided, that this section shall not prohibit or interfere in any way with the right of the state of Kentucky, or her lessees, to extend the railroad now in use, or any other she may by law construct from Lexington to Frankfort, through Broadway street, in said town, to the river, or in any manner interfere with the rights and privileges granted by the state of Kentucky to the present

lessees of the Lexington & Ohio Railroad, unless the written consent of the said lessees shall be first obtained.

Approved February 29, 1848.

An act to amend the charter of the Lexington & Frankfort Railroad Company, and Louisville & Frankfort Railroad Company.

Sec. 2. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that so much of the twentieth section of the aforesaid recited act as limits the freight to be charged by said company for the transportation of goods, produce, merchandise or property, on their railway, be, and the same is hereby, repealed; and said company shall have power to charge for tolls and the transportation of goods, merchandise, produce or property of any kind whatsoever, transported by them along said railway, any sum not exceeding the following rates, viz.: For transporting single packages, any distance, weighing less than one hundred pounds, twenty-five cents, and at that rate if such package weighs more than one hundred pounds; for transporting goods, merchandise, produce or property of any description, weighing over sixty-five pounds to the cubic foot, not more than four mills per hundred pounds per mile; for transporting any goods, merchandise or property, weighing more than forty-five pounds and less than sixty-five to the cubic foot, not exceeding 15 per cent over the rates allowed to be charged for heavy merchandise; for transporting any goods weighing more than twenty and less than forty-five pounds to the cubic foot, not exceeding 30 per cent over the same rates; and that in the transportation of goods, merchandise or property, weighing less than twenty pounds to the cubic foot, said company shall have the

right to estimate each cubic foot as weighing twenty pounds, and to charge for the transportation of the same at the rates hereby fixed. Silver and gold bullion, money of all descriptions, and mails, are excepted from the rates herein established, and the board of directors, or their agents, shall be, and they are hereby, authorized to contract especially for their transportation upon such terms as the parties interested therein may agree upon.

Approved December 21, 1850.

An act to amend the charter of the Louisville & Frankfort Railroad Company, approved February 23, 1856.

Sec. 4. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that said company shall have the same authority to charge for receiving, forwarding and storing packages consigned to them or their agents, or deposited in their warehouse or depots, or with their agents, for safekeeping, to be forwarded, as the Lexington & Frankfort Railroad Company has under the twentieth section of an act approved February 28, 1848.

Kentucky Statutes limiting railroad franchise to corporations.

Section 538. Any number of persons, not less than three, may associate to establish a corporation for the transaction of any lawful business, or to promote or conduct any legitimate object or purpose under the provisions of, and subject to the requirements of this article; but banking, building and loan, trust, insurance and railroad corporations shall, in addition to the provisions of this article, which are not inconsistent with the laws

relating especially to them, be organized in the manner and subject to the provisions of such laws.

Sec. 539. Such persons shall execute articles of incorporation which shall specify:

(1) The name of the corporation, which shall be such as to distinguish it from any other corporation engaged in the same business, or promoting or carrying on the same objects or purposes in this state.

(2) The name of the city or town and county in which its principal office or place of business is to be located.

(3) The nature of the business, or objects or purposes proposed to be transacted, promoted or carried on.

(4) The amount of its capital stock, if any, and the number of shares into which the same shall be divided.

(5) The names and places of residence of each of its stockholders, and the number of shares of stock subscribed by each.

(6) The time when it is to commence, and the period it is to continue.

(7) By what officers or persons the affairs of the corporation are to be conducted, and the time and place at which they are to be elected.

(8) The highest amount of indebtedness or liability which the corporation may at any time incur.

(9) Whether the private property of the stockholders, not subject by the provisions of the law under which it is organized, shall be subject to the payment of corporate debts, and if so, to what extent.

Companies—Organization and Reorganization of,

Sec. 763. Corporators—number and powers—articles of incorporation—filing of—subscription per mile.

Any number of persons, not less than seven, may associate to form a corporation for the purpose of constructing, operating and maintaining a railroad. Such persons shall execute articles of incorporation, which shall specify the name of the proposed railroad, the number of years the corporation is to continue, the amount of its capital stock, and the number of shares into which the same shall be divided; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the name of each county into or through which it is intended to be constructed, and its length as near as may be. Each subscriber to such articles shall set opposite his name his place of residence and the number of shares subscribed by him. Whenever two hundred and fifty dollars per mile has in good faith been subscribed, and twenty per cent thereof paid in in cash, to the persons named in the articles as directors, and an affidavit made to that effect by two of said named directors and attached thereto, a copy of said articles and affidavit shall be filed in the office of the Railroad Commissioners, and in the office of the Secretary of State; and when a certificate of such fact is delivered by the said officers to the incorporators, the persons who have subscribed such articles shall be a body-corporate by the name specified in the articles, and as such may sue and be sued, contract and be contracted with, have a seal, and change the same at pleasure; may elect or appoint directors, who shall choose from their number such officers as may be necessary; may require from any officer or employe a bond for the faithful discharge of his duties, and prescribe such by-laws for its government, and exercise such powers as are necessary to the conduct of its business not inconsistent with law.

Sec. 562. If the franchise and property of any corporation is sold, the persons who may become the purchasers, at private sale or under the judgment of the court, may organize a corporation for the construction, operation and management of the same; and such corporation, when organized, shall have the same rights, privileges and franchises as have been granted to or acquired by the corporation purchased; and shall be subject to all the limitations, restrictions and liabilities imposed upon it; and, in addition thereto, shall be subject to all the provisions of this chapter. Such corporation shall be formed by articles of incorporation executed by the purchaser and his associates, and which shall, in addition to the requirements of Section five hundred and thirty-nine of this article set forth a description of the property sold, and the decree under which the sale was made, if it was sold under a judgment, or if not, the deed conveying the property, the amount paid or to be paid, and to and by whom, and such other statements as may be deemed necessary. The articles shall be signed by the purchaser and his associates, if any, and a copy thereof recorded in the office of the Secretary of State; and if a railroad, in the office of the Railroad Commission; and when a certificate of such fact is delivered to the purchaser, the corporation shall be deemed to be organized, and shall have all the rights, powers and privileges, and be subject to all restrictions, limitations and liabilities of other similar corporations organized under this chapter.

FILED.
FEB 23 1909
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 521.

Adam T. Siler, McDougal Ferguson, and Lew P. Tarlton, Constituting the Railroad Commission of Kentucky, - - - - - - - - - - - - - - - Appellants.

vs.

Louisville & Nashville Railroad Company, - - - - Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

BRIEF FOR APPELLEE.

HENRY L. STONE,
Counsel for Appellee.

THE GLOBE PRINTING CO., LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 521.

ADAM T. SILER, MCDOUGAL FERGUSON AND LEW P. TARLTON, CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, ... *Appellants,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, . . *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This suit was instituted by the appellee July 25, 1906, against the appellants, Siler and Ferguson, and also Charles C. McChord, then members of the Railroad Commission of Kentucky, to enjoin the enforcement of an order entered by said Commission June 20, and promulgated July 20, 1906, whereby it was declared that all of appellee's class rates on intrastate freight between all points on all its lines of railroad in Kentucky were extortionate, unjust and unreasonable, and appellee was forbidden to charge, collect or receive for the transpor-

tation of such freight classified as and belonging to Classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, H, F, I, L, M and N to and from points wholly within that State, rates in excess of those prescribed by said Commission, and shown in a schedule for the distances therein set forth, styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad Company." This order contained a proviso that, where appellee had in effect a tariff or tariffs of rates upon any commodity or commodities belonging to either of said classes, and for any of the distances stated in said Commission's schedule, less than those shown therein, appellee was expressly forbidden to charge, collect or receive rates in excess of those thus shown. (See Commission's Schedule of Maximum Rates, Record 86-88.)

The reduction in said class rates as ordered by said Commission were radical, amounting to and intended to be (as admitted by said Commission) 20% of the then existing rates shown by appellee's "Table A, Local Freight Tariff," between all stations for distances of 20 miles or less, and of 25% between all stations for distances over 20 miles. (Comparison of present "Table A" Rates, R. 68-69). On the basis of the results of operations for the previous fiscal year ended June 30, 1905, this annual reduction in appellee's receipts on intrastate freight in Kentucky would have been at least $150,673.74 (Par. XII of Appellee's Bill, R. 26). In addition, appellee alleged it would sustain an annual loss on interstate shipments, directly and necessarily resulting from an enforcement of said order, amounting to not less than $50,000. (Par. XXI, Appellee's Bill, R. 43.)

The power and authority of said Commission to make and enforce the order complained of is claimed by appellants to be derived from an Act of the Kentucky

Legislature, approved March 10, 1900, commonly called the "McChord Act," which is as follows:

An Act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be

an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent, or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars.

Sec. 2. The Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

Sec. 3. Prosecutions under this Act shall be by indictment.

Sec. 4. All prosecutions under this Act shall be commenced within two years after the offense shall have been committed.

Sec. 5. In making said investigation, said Commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the Chairman of the Commis-

sion, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment.

This Act now constitutes Sec. 820a, Kentucky Statutes. (Carroll's Ed. 1909.)

By Section 209 of the Constitution of Kentucky, adopted September 28, 1891, the Railroad Commission of that State was established and provided for as follows:

> A commission is hereby established, to be known as "The Railroad Commission," which shall be composed of three Commissioners. During the session of the General Assembly, which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate said three Commissioners, one from each Superior Court District as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The Commissioners so appointed shall continue in office during the term of the present Governor, and until their successors are elected, and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the Commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the Governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this Constitution. The General Assembly may from time to time change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the Commissioners be all elected by the

qualified voters of the State at large. And if so required, one Commissioner shall be from each district. No person in the service of any railroad or common carrier, company or corporation, or of any firm or association conducting business as a common carrier, or in anywise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners. The General Assembly may, for cause, address, any of said Commissioners out of office by similar proceedings, as in the case of Judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said Commissioners, and to impose proper penalties therefor.

Prior to the adoption of the present State Constitution said Commission had not been empowered by any constitutional or statutory provision to regulate or fix the rate, toll, or compensation which a railroad company might charge, collect or receive for the service of transporting freight or passengers in that State, nor was there any attempt made by the General Assembly of Kentucky afterward to confer such power upon said Commission until March 10, 1900, when the McChord Act was approved. By this Act it will be observed the General Assembly undertook, as appellee alleges (Par. V, R. 10-13), to clothe said Commission, when complaint shall be made to it, or when it receives information or has reason to believe that any railroad company is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in Kentucky, with

judicial, legislative and executive powers, in violation of Sections 27 and 28 of the State Constitution, which provide as follows (R. 11):

> Sec. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> Sec. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Said Constitution by Sections 109 and 135 also provides as follows (Ib):

> Sec. 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.
>
> Sec. 135. No courts, save those provided for in this Constitution, shall be established.

Appellee in its bill alleges that said Commission is an anomolous and unconstitutional body, which, with respect to all proceedings or investigations before it concerning rates charged, collected or received by railroad carriers of intrastate freight and passengers, occupies the attitude of complainant, judge, legislator and prosecutor. In other words, it may itself be the complainant or act as the complainant's attorney; as judge it may try all preliminary questions and pass on the guilt or innocence of the railroad carrier accused of extortion;

as legislator it may make and fix the compensation of such carrier, found by it guilty of extortion, for like services thereafter rendered; as informer it may procure indictments by the grand jury for any disobedience of its legislative acts by such carrier, or any of its officers, agents or employes; and as prosecutor it may recover in behalf of the State from such carrier, officer, agent or employe thus indicted the enormous penalties imposed by said Act for such disobedience.

While, under the provisions of the State Constitution above referred to, this Commission is not and cannot be a court, no appeal to any court or tribunal possessing judicial powers is allowed or provided for by the McChord Act or any other statute of Kentucky, in behalf of a railroad carrier, from any order of said Commission adjudging such carrier guilty of extortion, or making and fixing what it shall have determined to be a just and reasonable rate, toll or compensation for such carrier to charge, collect or receive for like services thereafter rendered, in lieu of the rate, toll or compensation held by said Commission to be extortionate. In other words, no matter how just or reasonable the existing rate of such carrier may be, or how confiscatory or discriminatory the rate fixed by said Commission in lieu thereof may be, its order declaring the former extortionate, and the latter just and reasonable, is by the provisions of the McChord Act final and conclusive, or intended to be so by any reasonable construction of said Act. In any prosecution by indictment in the Circuit Court having criminal jurisdiction the severe penalties imposed by said Act for disregarding the final order of said Commission, or charging, collecting or receiving a higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission,

neither the carrier, its officer, agent nor employe, indicted for the offense of extortion, is by the terms of said Act, or any other statute of Kentucky, allowed or permitted to interpose or establish by evidence at the trial the defense that the existing rate charged, collected or received by such carrier is just and reasonable, or that the rate made and fixed by said Commission in lieu thereof is unjust and unreasonable.

In the bill of appellee it is further alleged that the McChord Act is not only unconstitutional and void because it violates the State Constitution in the respects mentioned, but that it constitutes an abandonment by the State of Kentucky of a republican form of government in so far as it vests legislative, executive and judicial powers of an absolute and arbitrary nature over the property of railroad carriers and the use thereof, in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and is, therefore, void, and the enforcement of said Act would operate to deprive such carriers of their property without due process of law, and to deny to them the equal protection of the laws, in violation of Section I, Article XIV of the amendments to the Constitution of the United States.

Furthermore, appellee alleged in its bill (Par. VI, R. 13):

> The said Act deprives the carrier interested or affected of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy and substitutes therefor as an absolute finality the action of said Railroad Commission, which, in view of the provisions

of the Constitution of the State of Kentucky, is and can be at most only an administrative body or tribunal, and is not and cannot be clothed with judicial powers or functions, and does not possess the machinery of a court of justice, and is, therefore, incapable of affording the judicial investigation to which complainant and other railroad carriers are entitled, and by the enforcement of the provisions of said Act complainant is denied the privilege and right to have judicially determined by a court of competent jurisdiction whether or not the rates charged, collected or received by it for the transportation of intrastate freight and passengers on its lines of road in the State of Kentucky, are just and reasonable, and whether or not the rates made and fixed by said Commission for like services thereafter rendered are in fact just and reasonable, or a confiscation or spoliation of its property.

Again appellee alleged in its bill (Par. VI., R. 13):

Said McChord Act has not been construed in any case by the Court of Appeals, the highest court of the State of Kentucky, nor has it been upheld in any case as valid or constitutional, measured by either the Constitution of the State of Kentucky or the Constitution of the United States, by any court of competent jurisdiction, either State or Federal.

Appellee also alleged (Par. VII, R. 14):

In its effort to prevent any judicial inquiry as to the validity of said McChord Act the General Assembly of the State of Kentucky burdened with excessive, extreme and cumulative fines and penalties any challenge thereof in the courts, so that the carrier or party affected thereby is necessarily constrained to submit to an unjust and unreasonably low rate made and fixed by said Commission for its services in transporting intrastate freight or passengers, rather than take the chances of the fines

and penalties imposed for a refusal or failure to comply with said Commission's final order making and fixing such rate, and thus such carriers are deprived by the State of Kentucky, through the operation of said Act, of the equal protection of the laws in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Furthermore the fines and penalties imposed and made cumulative by said McChord Act are excessive within the meaning and intent, and in violation of Section 17 of the State Constitution of Kentucky, and of Article VIII of the amendments to the Constitution of the United States, and said Act is, therefore, unconstitutional and void.

Paragraph VIII of appellee's bill is as follows (R. 14):

Complainant states that, while all other common carriers are subject only to the common law requirement that their rates shall be just and reasonable, and, in case of a controversy, are entitled to have the judgment of the courts upon the question of the reasonableness thereof, the State of Kentucky by said McChord Act singles out common carriers by railroad and denies them the equal protection of the laws granted by said State to all other common carriers, and deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates, when the same are called in question or charged to be extortionate, and substitutes therefor the arbitrary determination of said Railroad Commission, a non-judicial body, which does not and cannot afford a judicial hearing or determination of such questions brought before it; and, whereas, all other common carriers, in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable, are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or burden attaches to such judicial determination, a common carrier by railroad is, by the

provisions of said Act, subjected, in the absence of any judicial investigation or determination whatever as to whether its rate is reasonable, and simply upon the determination of said non-judicial body that such railroad carrier is or has been guilty of extortion, to the penalty of having the power to make and fix its rates taken out of its hands and vested exclusively in said Commission, which is then, according to the provisions of said Act, required to make and fix what it may think is a just and reasonable rate, toll or compensation to be charged, collected or received by such railroad carrier for like services thereafter rendered, and if such railroad carrier fails or refuses to comply with the rate made and fixed by said Commission it is subjected, for every shipment passing over its line of road to which said Commission may desire the rate made and fixed by it to apply to the prosecutions, excessive fines and cumulative penalties imposed and prescribed by said Act, and thus said railroad carrier is deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Appellee in its bill made the following further allegation (Par. IX, R. 15):

Said McChord Act relates to and affects all freight and passenger rates charged, collected or received by railroad carriers in the State of Kentucky, and is not restricted to rates actually charged, collected or received within said State for the transportation of traffic, having its origin and destination in said State, and by its terms and provisions said Act is an express and direct interference with and regulation of interstate commerce, and in conflict with subsection three (3), section eight (8), of Article One (1) of the Constitution of the United States, which vests in the Congress of the United States the exclusive power to regulate commerce

among the several States, which power the Congress has exercised by "An Act to regulate commerce," approved February 4, 1887, and the amendments thereto, and said McChord Act is, therefore, unconstitutional and void.

Appellee's charter was granted by the General Assembly of Kentucky March 5, 1850, by which it was authorized to construct and operate a railroad from Louisville, Kentucky, to the State Line in the direction of Nashville, Tennessee. Thereafter its charter was amended, March 20, 1851, by which it was authorized to construct and operate a branch of its railroad to the Mississippi river, and any other branches it might desire. Again its charter was amended January 17, 1856, by which it was authorized to purchase and hold any railroad constructed by any other company. Subsequently its charter was amended by divers other acts, by virtue of which at the time this suit was instituted it owned, held and operated nearly 1,300 miles of railroad located in fifty-four (54) counties in Kentucky. The extent and character of each line and branch are fully set out and described in its bill. (Par. I, R. 2-5.)

Appellee's system of railroads, of which those in Kentucky formed a part, contained over 4,100 miles, during the fiscal year ended June 30, 1905, and when this suit was brought nearly 4,300 miles, which extended into thirteen States, and appellee had for many years prior thereto, and has ever since, carried over its lines in Kentucky a large traffic, both freight and passenger, and both intrastate and interstate, about 70% of such traffic transported over its lines in Kentucky being strictly interstate traffic and much of the remainder being virtually interstate, the rates upon which having a direct and vital connection with the rates on that class of traffic, and a far-reaching effect and influence upon commerce between the States.

By Paragraph 11 of its bill appellee relied upon the maximum rates fixed in its charter as an inviolable contract with the State as follows (R. 5-6):

> Complainant states that by its said charter and the amendments thereto it was authorized to charge and collect for the transportation of goods, merchandise and property of any kind whatever, any sum not exceeding the following rates, to-wit:
>
> For every one hundred pounds transported over twenty miles and under fifty miles, three and one-half (3½) mills for each mile; for all other transportation of freight and property, not exceeding four (4) mills for each mile per hundred pounds; for transporting single packages any distance weighing not less than one hundred pounds, twenty-five (25) cents; for transporting live stock, poultry, furniture, feathers, wool, rags, and other like light bulky articles, weighing not more than sixty-five pounds to the cubic foot, not exceeding fifteen (15) per cent. above the rates allowed to be charged for heavy merchandise. Gold, silver, bullion, money of all kinds, and mails, are excepted from the rates established in its charter, and complainant's board of directors is thereby authorized to contract especially therefor. For the transportation of passengers complainant is authorized to charge not exceeding four (4) cents per mile for each passenger with his baggage, weighing not more than forty (40) pounds. Said maximum rates, which complainant is thus authorized to charge and collect, are set out, in part, in section eighteen (18) of its original charter, approved March 5, 1850, and, in so far as they are not set out in that section, complainant is authorized by that section to charge and collect the same maximum rates as were, at the date of the passage and approval of its said original charter, authorized to be charged and collected by and on the railroad from Lexington to Frankfort, Kentucky, which maximum rates were on March 5, 1850, as set out in section twenty (20) of the Act of the General

Assembly of the Commonwealth of Kentucky, entitled "An Act to incorporate the Lexington & Frankfort Railroad Company," approved February 28, 1848, and said maximum rates so provided for in section twenty (20) of said last-mentioned Act were in full force and effect, charged and collected, upon said railroad from Lexington to Frankfort on March 5, 1850.

Complainant states that by reason of the premises there was thus a valid contract made, which still subsists, between the Commonwealth of Kentucky and complainant, whereby complainant was and is authorized to charge and collect on the railroads owned or leased and operated by it within said Commonwealth, rates for the transportation of freight and passengers, not exceeding the maximum rates herein above set out, under its said charter and the amendments thereto, and complainant states that said railroads in Kentucky were constructed and acquired by it upon the faith of said contract. Complainant further states that the provisions of its said charter which thus granted and authorized it to charge and collect the maximum rates aforesaid have never been repealed by any act of the General Assembly of the Commonwealth of Kentucky, and the same are still in full force and effect.

Complainant states that it has never charged and collected on any of the railroads it owned or operated for the transportation of property or persons in the State of Kentucky any rate or rates in excess of the maximum rates prescribed and authorized by its charter as aforesaid.

The confiscatory character of the rates made and fixed by the order complained of, and the facts showing that its enforcement would deprive appellee of its property without due process of law, and deny to it the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, are fully set out in appellee's bill. (Pars. XIII, XIV, XV, R. 26-32.)

For the fiscal year ended June 30, 1905, the operations of which year formed the basis for the making of the order complained of, it is alleged (R. 27) that the entire intrastate business or gross earnings of appellee in Kentucky, freight and passenger, amounted to 30.21% of all its gross earnings from operation in that State for said year, or $4,424,235.77. Of this sum the intrastate gross earnings from freight traffic alone were $2,660,463.08. Assuming that the cost of operating expenses for doing intrastate business in Kentucky was no greater proportionately that the general cost or operating expenses for doing the entire business in that State, the proportion of operating expenses, including taxes (72.58%) chargeable to intrastate business was $3,211,-110.32. On this basis the net earnings from all intrastate business in Kentucky for that year were $1,213,-125.45. Of this sum the net earnings from intrastate freight traffic alone were $699,852.07.

In Paragraph XIV of appellee's bill (R. 28-31) six separate tables are given showing as many methods of ascertaining the value of appellee's properties in Kentucky devoted to intrastate business, on neither of which valuations of appellee's investment in that State under its existing rates did the appellee realize a return of as much as 6%, the legal rate of interest in that State, for the year ended June 30, 1905.

Paragraph XV of appellee's bill is as follows (R. 31-32):

> Complainant states that the net earnings on intrastate traffic in Kentucky, as hereinabove set forth, are ascertained by deducting from the gross earnings from such traffic only the average percentage which the operating expenses and taxes (69.16% plus 3.42% or 72.58%) are of the entire gross earnings from all traffic in that State, when in fact the percentage of operating expenses for local

or intrastate business in Kentucky is and would exceed the percentage of operating expenses on all business by at least twenty-five (25) per cent. The fact of this extra cost of local or intrastate business was established by the evidence introduced in the proceeding before said Commission, the percentage in excess on all business having been variously estimated at from ten (10) to twenty-five (25) per cent., the latter percentage having been testified to by several competent expert witnesses introduced in behalf of this complainant, without any testimony to the contrary, or tending to prove the incorrectness of that estimate.

Complainant states that for every $1.00 earned by it on intrastate traffic in Kentucky for the fiscal year ended June 30, 1905, it cost complainant, at least ninety-seven and fifty-eight hundredths (97.58) cents, leaving its net earnings only two and forty-two hundredths (2.42) cents; and its net earnings on such traffic in that State were not more on the dollar in prior years, nor have they been since.

Complainant states that the legal rate of interest in the State of Kentucky is six (6) per cent. per annum, but on account of the extra hazards of the railroad business complainant is entitled to net earnings or an income greater than six (6) per cent., or at least eight (8) per cent. per annum, which would not be more that a just and reasonable return on the fair value of its investments or railroad properties in Kentucky devoted to, used or employed for the transportation of intrastate traffic. On this fair value of its investments or properties so devoted, used or employed in Kentucky, ascertained by either of the methods stated in Part XIV hereof, complainant did not for the fiscal year ended June 30, 1905, for any prior fiscal year, or for the last fiscal year, under its existing rates, receive, after deducting operating expenses and taxes, a fair, just or reasonable annual return or income, or as much as six (6) per cent. per annum, much less eight (8) per cent. per annum, to which it was and is reasonably entitled. But, notwithstanding these

> facts, the said Commission in reaching its conclusions as embodied in its opinion and order reducing complainant's rates, as aforesaid, and thus reducing its receipts on intrastate traffic to the extent, at least, of $150,673.74 per annum, erroneously held that four (4) per cent. per annum was and is a fair and just return on the value of complainant's railroad properties devoted to intrastate traffic in Kentucky, and, on that ground and other unwarranted assumptions, promulgated its order reducing complainant's rates as aforesaid.

Appellee in its bill further alleged that the members of said Commission in their opinion and order promulgated July 20, 1906, assumed the power, which they did not possess under the provisions of the McChord Act, or any other statute of Kentucky, to make and fix a *classification of freight traffic* for and to be observed by appellee and other railroad carriers operating lines in that State, and changed and interfered with the rules and practices of such carriers, without authority of law to do so, and their action in that respect was null and void.

Furthermore, said Commission by its said order, without authority of law, either under the McChord Act or any other statute of Kentucky, assumed the power, and undertook to make, publish and establish a *schedule of maximum rates* on freight traffic for and to be observed by appellee and other railroad carriers operating lines in that State, and that their action in that respect was likewise null and void. (Par. XX, R. 42).

With respect to this assumption of power appellee further alleged (R. 43):

> The defendants, constituting said Commission, possess no power under the McChord Act to make, publish and establish a schedule of maximum rates on freight traffic, or to require complainant, or the

other railroad carriers operating lines in Kentucky, to observe the same. Their power to make and fix a rate, if any they have at all, under said Act (and complainant avers they have none thereunder) is limited to a case where upon complaint or their motion, after notice and investigation, they find an existing rate is extortionate, when they may then, in lieu of the particular rate held by them to be extortionate, make, fix and name a rate which they shall determine to be a just and reasonable one for like services thereafter rendered.

Appellee further alleged in its bill that its existing rates and charges in effect on its several lines in Kentucky, and applicable to its intrastate freight business, instead of being extortionate, were not higher than was just and reasonable when they are considered with respect to the value of its property or investments used in public service or devoted to such traffic, or with respect to the value of the service rendered to the shippers or public generally, and it had the lawful right as inherent to its business as a common carrier of freight and pasengers to charge and receive for the services rendered by it in that State just and reasonable rates, which right to charge and receive such just and reasonable rates was a property right that neither the State of Kentucky nor any other governmental agency thereof could take from it or interfere with, and that said Commission's order, if permitted to be put in force would deprive it of its said property right without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Furthermore, appellee alleged that the fiscal years ended June 30, 1904, June 30, 1905, and June 30, 1906, were the most prosperous years of any during the period it had operated its lines in Kentucky, and yet during neither of said years did it receive from its existing

rates on intrastate freight as much as a fair or just return on the value of its investments in that State devoted to the service of carrying that traffic, and to put into effect said Commission's order, providing reduced rates, would not in any wise result in materially increasing the volume of intrastate freight over its lines in that State or its receipts from such traffic, and it could not, therefore, reasonably expect any material increase in its gross earnings on such traffic upon its lines in that State to offset the loss it would necessarily sustain by reason of such reduction in its rates.

Appellee also alleged that to require it to operate its railroad properties in Kentucky for so small a return upon their actual value as would necessarily result from the enforcement of said order was and would be a practical confiscation of the same and the use thereof; it would deprive it of its said properties devoted to the carrying of intrastate freight in that State without due process of law; it would operate to take its said properties for public use without just compensation; and it would deny to it the equal protection of the laws, in violation of the provisions of the Constitution of the United States theretofore referred to, and especially Articles 5 and 8 thereof and Section 1 of the Fourteenth Amendment thereto.

Still further appellee alleged that its officers, agents and employes during the time it had operated and controlled its several lines of railroad in Kentucky had managed the same honestly, skillfully and economically; that they had used all reasonable efforts to procure passengers, mail, express, freight and other intrastate traffic for transportation over the whole and every part of its said lines; that they had charged and received for the transportation of intrastate freight and passenger traffic and for mail, express and other intrastate traffic over its

several lines in Kentucky rates which, though just and reasonably low, were as high as were allowed by law or by competitive conditions and other circumstances affecting such traffic on each of its said lines; that its gross earnings on each of its lines in Kentucky had been as low as was possible to make them under its existing just and reasonably low rates and under the existing competitive or other conditions and circumstances; that the taxes on its said railroad properties in that State had been only such as had been claimed to be lawfully levied and assessed and were paid to maintain the operation of its said railroad properties; that the rate of interest on its mortgage bonds resting as liens on said properties in Kentucky was as low as it was possible to make it; that the operating and other expenses had been kept down as low as possible having in view the operation of trains and the proper maintenance and efficiency of said properties for the public service in which they were employed; that the supplies, material and labor used for this purpose were procured as cheaply as possible; and that the amount paid by it for general officers' salaries and for employes' wages on account of its several lines in that State had been as low as practicable, considering the necessity for employing competent officers and employes.

Appellee further alleged that its system of rates theretofore and then being charged and collected by it in the operation of its several lines in Kentucky for the transportation of freight between points wholly within that State were and are just and reasonable in and of themselves and for the service performed, and the same with careful, skillful and economical management would not thereafter produce (as they had not theretofore produced) such an amount of revenue as would, while being just and reasonable to shippers and the public,

yield more than a fair or just return upon the actual value of its railroad properties, rights and franchises situated in that State and devoted to the service of such shippers or the public in carrying intrastate traffic, and that the members of said Commission in their order aforesaid attempting to reduce the freight rates on appellee's lines in Kentucky between points in that State ought not to be sustained, but should their said order be allowed to go into force and effect, appellee could not earn sufficient revenue upon its railroad properties in Kentucky devoted to the transportation of intrastate freight to yield a fair or just return upon their actual value, and said Commission would, unless enjoined and restrained from so doing by the court at the expiration of ten days from July 20, 1906, when its said order was mailed to and received by appellee's District Attorney, claim that said order had become final and conclusive and would compel or undertake to compel appellee to submit to said unwarranted and ruinous reduction in its rates, as set forth therein, and would be thereby rendered unable not only to earn a fair or just return upon the value of its investments or its railroad properties employed and used for the transportation of intrastate freight in that State, but from the operation of its said railroad properties it would be unable to pay operating expenses, taxes, cost of betterments, improvements and renewals and interest on its bonded indebtedness. (Pars. XXII, XXIII, XXIV, XXV, R. 44-46.)

In Paragraph XXVI appellee in substance alleged that in the operation of its lines in Kentucky and in the transportation of freight thereon between points in that State, should said Commission's order be put into force and effect, it would be restricted to charging and collecting no higher rates than those which said Commission

had prescribed in its order, and however unreasonably low and unjust the rates so prescribed were, appellee must either accept them, with or without protest, or act at its peril if it attempted to charge or collect any higher rates, and in the hundreds and thousands of prosecutions by indictment that might and would be instigated and recommended by said Commission against appellee, its officers, agents and employes to recover excessive fines and penalties imposed by the McChord Act, the schedule of rates made and fixed by said Commission must and would be taken by the court having criminal jurisdiction of the public offenses charged as final and conclusive that the rates prescribed therein were just and reasonable and that any higher rates charged or collected by appellee were unjust, unreasonable and extortionate and therefore in violation of the provisions of the McChord Act. In other words, that in all such prosecutions the Commonwealth of Kentucky would only have to produce the Commission's schedule of rates, prove that it was mailed to appellee, or one of its officers, agents or employes, and that the rate charged, collected or received thereafter by appellee, or one of its officers, agents or employes, as the case might be, on any line of appellee in Kentucky, between points in that State was in excess of that fixed in said Commission's schedule of rates and, without more, conviction would certainly and inevitably follow.

Appellee in addition alleged that the question as to what was a just, reasonable or non-confiscatory rate to be charged or collected for the transportation of freight or other traffic is an exceedingly difficult and complicated one; a question for the consideration of which a jury is wholly unsuited; a question which requires for its determination and inquiry into numerous and technical facts, to prove the existence of which necessitates the

introduction of many witnesses, among them railroad agents and employes who are engaged in other duties of great importance to the public, the proper discharge of which requires the almost constant attention of such officials, agents and employes in the offices where their books, accounts, records and papers are kept; that if in the operation of its lines in Kentucky it failed or refused to accept or put into force and effect said reduction in rates as prescribed in the order complained of said Commission would cause to be instituted a multitude of prosecutions by indictment against appellee, its officers, agents and employes through the grand jury and Commonwealth's Attorney of each of the fifty-four (54) counties in that State through or into which its lines run to recover the excessive fines and penalties imposed by the McChord Act for violations thereof, and appellee would be subjected to great expense and loss of time of its officers, agents and employes in giving the necessary attention to the defense of such prosecutions.

Furthermore, appellee alleged that in the multiplicity of such legal proceedings, which it sought to avoid, the same questions would be involved without any opportunity for it, or its officers, agents or employes, as the case might be, to make a defense or show by evidence the unreasonableness or unjustness of the rates fixed by said Commission and the merits of any defense justifying the failure or refusal to obey said order could not be tried in a court of law or court of criminal jurisdiction or be fully and finally settled and determined otherwise than in a court of equity, and that the members of said Commission were threatening to carry out their said order reducing appellee's rates by recommending and procuring numerous indictments against it, as well as its officers, agents and employes on and after July 29, 1906, to recover the fines and penalties prescribed by

the McChord Act and would do so, unless immediately restrained and enjoined by the court from doing so; that it was not bound by, nor did it intend to obey, said order or put into force and effect the rates made and fixed by said Commission therein, and would not do so at any time thereafter, unless denied relief therefrom by the court having final jurisdiction of this case. (R. 46-47.)

In Paragraph XXVII appellee further alleged that the matter in dispute far exceeded, exclusive of interest and cost, the sum or value of two thousand ($2,000.00) dollars; that its cause was a suit arising under the Constitution of the United States, to-wit: Section 4, Article 4, Articles 5 and 8, and Section 1 of Article 14 of the amendments to said Constitution.

In consideration whereof and for as much as it was remediless in the premises at law or under the rules of the common law and could have adequate relief only in a court of equity where matters of this nature are properly cognizable and relievable, appellee prayed that an injunction might issue restraining and enjoining the members of said Commission individually and jointly as constituting said Commission from continuing said order of June 20, 1906, mailed to and received by appellee's District Attorney on July 20, 1906, or putting the same into force and effect on July 29, 1906, or at any time thereafter, so far as the lines of railroad operated by appellee in Kentucky, or either of them, were concerned; also restraining and enjoining said Commission to revoke and cancel said order and the schedule of maximum rates prepared thereunder, so far as they related to appellee's lines of railroad, as well as restraining and enjoining said Commission from recommending or causing to be instituted any prosecution by indictment or otherwise against it or any of its officers,

agents or employes to recover any fine or penalty imposed by the McChord Act for or on account of appellee's failure or refusal to put into force or effect on either or any of its lines of railroad in Kentucky, under protest or otherwise, the order complained of or the rates fixed in the schedule of maximum rates prepared thereunder; that in the meantime, and until a decision could be had upon appellee's motion for the injunction prayed for, a restraining order be granted immediately restraining the acts sought to be enjoined, appellee averring that there was danger of irreparable injury from delay if action were not taken until said motion for the injunction was heard and determined.

With its bill appellee filed Exhibit No. 1, being a copy of its existing Local Freight Tariff (R. 48-49); Exhibit No. 2, being a copy of the opinion and order of said Commission complained of (R. 50-69); and Exhibit No. 3, being a comparison of appellee's existing Table A rates with the rates prescribed by said Commission in its said order of June 20, 1906 (R. 68-69.)

On the day following the filing of appellee's bill, the court granted a restraining order, and set for hearing on September 24, 1906, the motion for a preliminary injunction as prayed for (R. 71). On the latter date the restraining order, by consent of parties, was continued as an interlocutory injunction until the final hearing of the cause or the further order of the court, the appellants not objecting thereto, upon condition that appellee stipulate, as it did, to keep its way-bills for intrastate shipments, and furnish to shippers bills of lading, receipts or expense bills on and after October 1, 1906, in such manner as to show, if it thereafter became necessary or expedient, what amount, if any, was charged to each shipper in excess of a lawful rate. (R. 72-73.)

On November 5, 1906, the appellants, without demurring, filed their answer traversing most of the material averments of the bill. (R. 73-101.)

To this answer appellee on December 3, 1906, filed a general replication. (R. 101-2.)

On January 7, 1907, the appellants filed Exhibits A, B, C, and D referred to in their answer (R. 103-140). These Exhibits consist of copies of the complaints and correspondence filed before said Commission, and of a portion of the answers of certain railroad companies made defendants to said complaints in the proceedings which culminated in the order reducing freight rates herein complained of.

On February 27, 1907, on the motion of counsel for both parties, the court below entered an order appointing a Special Commissioner to take the evidence that might be offered upon the issues formed by the pleadings and on the facts therein recited and to report thereon to the court at the earliest reasonable time practicable. (R. 141-2.)

On January 9, 1908, appellant Lew P. Tarlton, having, as appeared from a supplemental bill filed by appellee, succeeded in office the defendant Charles C. McChord, he was substituted for the latter as a defendant, and the preliminary injunction theretofore granted was so extended as to embrace him as one of the members of said Commission, and thereupon he entered his appearance to this suit. (R. 144-6.)

Appellants and said McChord filed their joint and several plea in abatement to appellee's bill and said supplemental bill (R. 147-9), which plea having been set down by appellee for argument, and having been argued by counsel, was on March 9, 1906, overruled by the court. (R. 149-50.)

On March 18, 1908, appellants filed their answer to

appellee's said supplemental bill, simply affirming the answer to the original bill, and denying that they or either of them, either individually or as constituting said Commission, had threatened to enforce said Commission's orders or any of them complained of herein. (R. 150). But they did not aver they did not intend to discharge this statutory duty.

To this answer appellee filed its general replication April 6, 1908. (R. 151).

On July 10, 1908, appellee by leave of court filed its amended bill wherein it, in substance, alleged that said Commission as its order promulgated July 20, 1906, herein complained of, showed on its face, made and applied its schedule of maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 1," to appellee and to only three other railroad companies operating lines in Kentucky, viz: the Cincinnati, New Orleans & Texas Pacific Railway Company, the Southern Railway Company in Kentucky, and the Nashville, Chattanooga & St. Louis Railway; and made and applied its said schedule of maximum freight rates, styled "Kentucky Railroad Commission's Standard Tariff No. 2," to the Illinois Central Railroad Company alone. That said Commission by its said order did not make or apply, nor has it by any other order, before or since, made or applied either of its said Standard Tariffs Nos. 1 and 2, or any other schedule of maximum freight rates to the following railroad companies, which were then, have been ever since, and are now engaged in the same business in that State as the appellee—that is to say, as common carriers of intrastate freight and passengers, with the following owned and operated mileage of railroad in that State, to-wit:

The Chesapeake & Ohio Railway Company ----------424.87 miles;

The Louisville, Henderson & St. Louis Railroad Company ----------165.20 miles;
The Louisville & Atlantic Railroad Company ----------101.10 miles;
The Lexington & Eastern Railway Company ---------- 92.54 miles;
The Mobile & Ohio Railroad Company ---------- 39.69 miles;

and all other railroad companies, of which there were many, owning and operating then, ever since, and now, a railway in Kentucky, with shorter mileage, all of which companies were made defendants to the complaints in the proceeding before said Commission, which culminated in the making of said order promulgated July 20, 1906.

That, while said Commission stated in its said order it made no mileage scale of rates or classification for the use of the Chesapeake & Ohio Railway Company, it ordered that said company should not collect or receive for the transportation of commodities rates in excess of those permitted to be charged by appellee, as shown in said Commission's said Standard Tariff No. 1, but said Commission then and has ever since refrained from mailing to any officer, agent or employe of the Chesapeake & Ohio Railway Company a copy of its said order, or from putting or attempting to put said order as to that company into force and effect, as prescribed in the McChord Act, or otherwise, and said order as to that company has never been completed or made effective by said Commission, nor had it been observed by that company.

That said Commission by its said order had arbitrarily and without authority of law undertaken to classify appellee with said three other companies and to prescribe a schedule of maximum freight rates for their observance, while neither it nor the Legislature of Ken-

tucky had ever prescribed any schedule whatever of maximum freight rates for or to be observed by said other above mentioned railroad companies, or either of them, then and now owning and operating their lines of railroad in that State, although they were then, have been ever since, and are now engaged in the same business in which appellee was then and now engaged, to-wit: the carrying of intrastate freight on their lines in Kentucky; and said Commission had thus permitted said other railroad companies to operate their said lines of railroad and conduct their said business in that State, without any schedule of maximum rates having been prescribed for them, and to charge, collect and receive higher rates than those prescribed as the maximum rates for appellee on the same classes of intrastate freight and commodities, for the same distances, or such freight rates as such other railroad companies might or may deem reasonable, over their lines in Kentucky.

That said arbitrary and unlawful classification of said railroad companies and prescribing of maximum intrastate freight rates for appellee and the few other railroad companies above named, and not for all railroad companies doing the same kind of business in Kentucky, was and is a positive, direct and unfair discrimination against appellee in favor of such other companies, and amounted to a denial by the State of Kentucky and said Commission (which is one of the instrumentalities provided by that State, and acting for and in its behalf) to appellee of the equal protection of the laws, in violation of the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 152-3.)

Thereupon appellants filed their answer to said amended bill, wherein they admitted most of the material facts alleged therein by appellee. They, however,

denied that the classification of the railroad companies operating lines in Kentucky was arbitrary, but failed to state on what, if any, basis they made the classification complained of. They also alleged that the circumstances and conditions as regards the business of conducting transportation in Kentucky by said other railroad companies were entirely dissimilar to that of appellee, and that there was no similarity with respect to the original cost of construction, the present valuation, the capitalization of the volume of business, the earnings or operating expenses, the financial condition or general conditions with respect to conducting transportation by either of said companies to that of appellee, and for this reason they did not make said schedule of Maximum Freight Rates applicable to either of said railroad companies referred to in appellee's amended bill, and for the further reason that the rates upon said other railroads, except in a very few minor instances, were not higher than said schedule of Maximum Freight Rates. They still omitted, however, to state the basis, if any, on which their classification was made, or to explain or justify, if they could have done so, why they discriminated between appellee greatly to its prejudice and in favor of the other railroad companies, for which no schedule of Maximum Freight Rates was prescribed for their observance, and left them free and untrammeled by such a schedule, with the valuable right to make and fix their own freight rates, and to charge, collect and receive higher rates than those prescribed as appellee's maximum rates on the same classes of freight and commodities, for the same distances, or such freight rates as such other railroad companies might deem reasonable in Kentucky. (R. 154-5.)

To this answer to said amended bill, appellee filed a general replication, thus putting in issue all the affirmative allegations made by appellants in their said

answer, and making it incumbent on them to sustain the same by proof, but none was offered by them for that purpose. (R. 156.)

Upon the filing of the last mentioned pleadings the parties by their counsel entered into and filed the following written stipulation, July 10, 1908 (R. 156-7):

> It is hereby stipulated by complainant and defendants as follows:
>
> With the view of saving time and expense incident to taking proof in this case, if it shall turn out that there are grounds upon which the case can be decided without such evidence, complainant is to make a motion to instruct the Special Commissioner to report that the order of July 20, 1906, is void, basing such motion on such grounds as may be assigned in writing, and on the face of the pleadings in this cause, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky pending the inquiry which led to the order of July 20, 1906. Defendants are to object to the said motion and urge any grounds of objection that seem to them fit, except as to the manner of raising the questions involved, which is waived; but defendants' counsel are to have reasonable notice of the time and place fixed for the hearing of such motion, unless the same shall be agreed upon between counsel for complainant and defendants. The making of this motion is not to be construed as a waiver of any other ground of relief which complainant has asserted in its bill, and especially is not to be considered as a waiver of the ground asserted in the bill that the rates fixed by the order are unreasonable and confiscatory.
>
> If the said motion is decided in favor of complainant and any decree based thereon is reversed upon appeal, such reversal is not to prejudice the right of the complainant to urge such other grounds of relief as are above stated. Pending said motion and any appeal from any order or decree based thereon, the further taking of proof before the

Special Commissioner is to be suspended.

Each party is to aid the other in a speedy determination of said motion, and the speedy deterimnation of any appeal which may be taken consequent upon the action of the Circuit Court thereon.

Nothing herein is to be deemed a waiver by the defendants of their right to make any objection they may wish to make to the jurisdiction of the court of this action.

On the same day counsel for appellee filed a further stipulation setting forth certain copies of demurrers, motions and answers filed by appellee in the proceeding before said commission, wherein the order complained of was entered, which copies, together with those filed as exhibits with appellants' original answer, it was stipulated and agreed were true and correct copies of all complaints, pleadings, motions and demurrers filed before said Commission pending the inquiry which led to the order aforesaid. (R. 158-166.)

Thereupon, in pursuance of the first above mentioned stipulation of the parties, appellee entered its motion, and assigned the following grounds in support thereof (R. 166-169):

This day came the complainant, and without waiving any other grounds for relief herein, or any other right to a final decree enjoining the enforcement of the order of the defendant Commission complained of, moved the Court, on the face of the pleadings, to instruct and direct the Special Commissioner herein to report that the order of the defendant Railroad Commission, purporting to establish "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad," made June 20, 1906, and promulgated July 20, 1906, herein complained of, is void, upon the following grounds, to-wit:

1. The statute commonly known as the

McChord Act, approved March 10, 1900, undertakes to vest in said Commission, an administrative body, legislative, executive and judicial powers, in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, and is, therefore, unconstitutional and void.

2. Neither the said Statute nor any other Statute of the State of Kentucky provides for an appeal to a court from a final order of said Commission, nor for any judicial investigation or judicial review of the question of the reasonableness of any rate fixed by said Commission for services of a carrier thereafter to be rendered, before the carrier is required to put the same into force and effect, but makes such order conclusive as to the sufficiency of the rate thus fixed, and the carrier is thus deprived of its property without due process of law, and denied the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The said Act imposes such enormous fines as a result of an unsuccessful effort to test the validity of the same, or of any final order of said Commission fixing a rate for the services of a carrier to be thereafter rendered, as to render said Act, on its face, violative of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting any State from depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

4. Said Act is unconstitutional and void because it undertakes to vest in said Commission, a non-judicial body, the judicial power of adjudging a carrier guilty of extortion for charging, collecting or receiving an existing rate, as a jurisdictional fact, to be first ascertained, before fixing a rate which such carrier may charge, collect or receive for like services thereafter rendered, without affording the carrier thus convicted an opportunity to be heard in any court on the question of its guilt or innocence of

the offense of extortion, or on the question of the reasonableness or sufficiency of the rate thus fixed after such conviction for like services thereafter rendered, whereby the carrier is deprived of its property without due process of law, and denied the equal protection of the laws guaranteed by the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Said Act, without attempting to repeal the charter of the complainant which fixes maximum rates which it may charge for its services, attempts to empower and authorize said Commission to subject complainant to criminal prosecution and heavy punishment for charging the rates authorized in its charter.

6. Said Act and order complained of undertake to impair the obligation of the existing contract between complainant and the State of Kentucky, whereby, under complainant's legislative charter and the amendments thereto, complainant is authorized and empowered to charge and collect for the transportation of goods, merchandise and property of any kind any sum on its railroads in Kentucky not exceeding the maximum rates prescribed by the provisions of its said charter and the amendments thereto, which have never been repealed by the General Assembly of Kentucky, and are still in full force and effect, as set forth in Paragraph 11 of its original bill, whereas the maximum rates attempted to be prescribed by the order complained of are far less than those prescribed by its charter and the amendments thereto on the same kind of commodities and property for the same distances, in violation of that provision of Sub-section One (1), Section Ten (10), Article One (1) of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts."

7. Neither under the title, nor the provisions contained in the body of said Act is said Commission authorized or empowered to prescribe and establish schedules of maximum rates or tariffs for the services of railroad carriers as is attempted to be done

by the order promulgated July 20, 1906, herein complained of.

8. The allegations of the complainants on which the order complained of herein was made and promulgated by said Commission were insufficient to give jurisdiction to, or authorize said Commission to make said order, or to prescribe and establish the maximum rates or standard tariff for all of complainant's lines, between all stations, for all distances, on all classes of freight in the State of Kentucky, even if said Act empowered said Commission to establish and prescribe such maximum rates or tariffs upon complaints of any character or under any circumstances.

9. Said Commission without assuming to find or condemn any of complainant's rates, except those set forth in its "Table A, Local Freight Tariff," as extortionate, which was a jurisdictional fact or condition precedent, in any event, to its exercise of power (if any it had at all in that respect), to make or fix rates, by its said order undertook to forbid complainant from charging, collecting or receiving rates in excess of those embraced in any of its commodity tariffs, which were or are less, for the same distances than those shown in said Commission's "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1, Applicable to the Louisville & Nashville Railroad," whereby said Commission attempted to prohibit complainant from increasing or advancing any rate or rates it had or has in force and effect on any commodity or commodities belonging to either of the classes set out in said so-called "Standard Tariff No. 1," notwithstanding the fact that such commodity rate or rates had not been found by said Commission to be extortionate, and the further fact that they were and are lower for the same distances than the maximum class rates which said Commission by its said order prescribed and promulgated as reasonable.

10. The said order shows on its face that the maximum rates therein prescribed styled "Kentucky

Railroad Commission's Standard Tariff No. 1," were arbitrarily made applicable to the Louisville & Nashville Railroad Company, and were not made applicable for the same distances and on the same classes of freight to all the other railroad companies operating lines in Kentucky, and although, without statutory power or authority to classify the said railroad companies in Kentucky on any basis whatever, for the purpose of prescribing freight rates to be charged and collected by them, the said Commission by said order undertook to prescribe such maximum freight rates to be observed by the complainant company, while other railroad companies operating lines in Kentucky were and are permitted to charge and collect higher rates on the same classes of freight for the same distances, or such freight rates as such other companies may deem reasonable, although said other companies were made defendants to and proceeded against under the same complaints before said Commission in the proceedings which culminated in the making of said order promulgated July 20, 1906, and thus the attempted classification by said Commission in this respect was not based upon the character or value of the services rendered, and said order, therefore, is unfair, discriminating, and amounts to a denial to complainant of the equal protection of the laws in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

On the same day appellants objected to appellee's said motion and the grounds thereof, and moved the court, on the face of the pleadings, to enter an order dismissing this action on the following grounds (R. 169-70):

First. This Court has no jurisdiction of the alleged cause of action set out in complainant's bill.

Second. The bill does not show any equity; and the averments of defendant's answer with respect to questions raised by said motion must be taken as admitted.

Third. None of the grounds stated in said motion is sufficient to entitle complainant to the relief sought.

After full argument by counsel for appellants and appellee of these motions, and due consideration of all the questions involved, the court below rendered the following opinion (R. 170-71):

> This cause has been submitted on motion for a final decree as prayed in the bill, pursuant to stipulation of the parties.
>
> In the case of Louisville & Nashville R. R. Co. v. McChord, 103 Fed. 216, Judge Evans after full argument and careful consideration, held what is known as the McChord Act involved herein to be unconstitutional and enjoined the Railroad Commissioners from taking action thereunder. On appeal to the Spreme Court this decree was reversed.
>
> McChord, et al., v. L. & N. R. R. Co., 183 U. S. 483.
>
> It was not reversed, however, on the ground that he had erred in holding said act unconstitutional, but on the ground that the action enjoined was legislation and a court had no authority to enjoin anticipated legislation. The question of constitutionality was waived and the only reference to it in the opinion was that it was a matter of "grave importance."
>
> In the recent case of In re Young that went up from Minnesota, Mr. Justice Peckham cited Judge Evans' decision as an authority in support of the position there taken.
>
> At the time of Judge Evans' decision this State had not been divided into two judicial districts. The decision was that of the United States Circuit Court for the District of Kentucky. This court has succeeded that court as to the Eastern District of Kentucky. In view of this, I do not think that I should consider the question on its merits. Comity requires that I should follow this holding of Judge Evans, backed up as it is, to a certain extent, by said reference to it by the Supreme Court.

I, therefore, in accordance with said decision, hold said act unconstitutional.

In addition I think it is to the interest of the parties to get this case to the Supreme Court as soon as possible where a decision can be had that is final as to the constitutionality of the act.

Until to-day I had not read the decision of the Supreme Court in the McChord case, all previous steps in this case, since the granting of the temporary restraining order, having been taken by the consent of the parties hereto; and I was under the impression that in that case the Supreme Court had overruled Judge Evans' holding that said act was unconstitutional. Otherwise, possibly, I might have indicated this position to the parties earlier in this cause.

Question is made as to the jurisdiction of this court of this case on the ground that there is no diversity of citizenship. Under the decision in the case of Raymond v. Chicago Traction Co., 207 U. S. 20, it would seem that this court has jurisdiction because of the federal question raised in the claim that the action of the Railroad Commissioners was in violation of the Fourteenth Amendment. If not, it has it because of the claim that said act itself is a violation thereof.

The motion is sustained and decree will be prepared accordingly.

Similar motions in the three other cases heard at the same time are sustained and decrees in those cases will be prepared also.

July 10th, 1908.

A. M. J. Cochran, Judge.

In pursuance of this opinion the court on the same day passed the following final decree (R. 171-3):

This day came the complainant and tendered and offered to file its amended bill, which is ordered to be filed; to which amended bill defendants filed their answer, and to which answer complainant filed its general replication.

Thereupon came the counsel for the complainant and counsel for defendants and tendered and offered to file their stipulation, dated May 2, 1908, and their stipulation dated June 18, 1908, which are ordered to be filed.

The counsel for complainant thereupon, in pursuance of said stipulations, entered their motion in complainant's behalf, dated June 18, 1908, and moved the court on the face of the pleadings, together with copies of the pleadings which were filed before the Railroad Commission of Kentucky, pending the inquiry which led to the order of July 20, 1906, and upon the written grounds set forth in said motion, to instruct the Special Commissioner herein to report that the order of the Railroad Commission of Kentucky, purporting to establish what is styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," Applicable to the Complainant, made June 20, 1906, and promulgated July 20, 1906, herein complained of, is void.

Thereupon counsel for defendants filed their objections to complainant's said motion, and entered their motion in behalf of defendants, on the face of the pleadings and the written grounds set forth in their said motion, that the court enter an order dismissing this action.

And said motions having by agreement of counsel been set for hearing on this day, the same were fully argued by counsel for complainant and defendants, and the court being fully advised thereupon ordered, adjudged and decreed as follows:

1. That the said objections and motion of the defendants be and the same are overruled, and the said motion of the complainant be and the same is sustained, the court being of the opinion that the act of the General Assembly of the Commonwealth of Kentucky, known as the McChord Act, approved March 10, 1900, and the order of the Railroad Commission of Kentucky, promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory (upon which no decision is or can now be made), violate the provisions of Section 1

of the Fourteenth Amendment to the Constitution of the United States, which prohibit any State from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, and that said order of said Commission, so far as it is made applicable to complainant, is, therefore, null and void, and the Special Commissioner is directed so to report herein.

2. Thereupon counsel for complainant and defendants stipulated and agreed that the said report of the Commissioner shall be and it is now treated and considered as filed in the terms above prescribed. And thereupon this cause was submitted for a final decree, and the court being further advised, ordered, adjudged and decreed that the preliminary injunction heretofore granted herein be and the same is made perpetual, and the defendants, Adam T. Siler, McDougal Ferguson, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, their successors in office, and said Commission, be and they are hereby perpetually enjoined and restrained from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, herein complained of, or putting the same into force and effect, and from enforcing or attempting to enforce the same, so far as it is made applicable to complainant, or so far as it relates to the lines of railroad owned or operated by complainant in the State of Kentucky, and from recommending or procuring indictments against complainant or any of its officers, agents or employes, to recover any fine or penalty for any violation of said order or for charging, collecting or receiving any rate or rates in excess of those prescribed by said order; and said defendants are further enjoined to revoke and cancel said order so far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff, No. 1," applicable to the Louisville & Nashville Railroad Company.

3. It is further ordered, adjudged and decreed by the court that the question of costs is not now determined but either party may, after the final determination of this cause in the Supreme Court of the United States, move for an order in regard thereto at the foot of the decree.

4. And then came defendants and in open court prayed and were allowed an appeal from this decree to the Supreme Court of the United States.

Defendants shall execute a bond in the penalty of five hundred dollars without surety, conditioned to prosecute said appeal, and file herein their assignment of errors—all within sixty days from the entry of this decree. No citation need be issued, the appeal being granted in open court and complainant being present.

Appellants having been granted an appeal to this court, file their Assignment of Errors as follows (R. 173-5):

The above named defendants, Adam T. Siler, McD. Ferguson and L. P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, conceiving themselves aggrieved by the judgment entered herein on the 10th day of July, 1908, in the above entitled cause, pray the court that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the Supreme Court of the United States. Defendants say that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

1. The Circuit Court of the United States for the Eastern District of Kentucky erred in holding and deciding that said court was bound by and should follow the decision of the United States Circuit Court for the District of Kentucky in the case of Louisville & Nashville Railroad Company vs. McChord, et al., as reported in 103 Fed. 216, and in its interpretation of the opinion in McChord, et al.,

vs. Louisville & Nashville Railroad Company, reported in 183 U. S. 483, reversing said former decree.

2. That said court erred in holding that it had jurisdiction of these defendants upon the subject-matter set forth in the bill of complainant when the allegations of said bill are that these defendants had not been vested with the power by either the Constitution of the State of Kentucky or by any Act of its Legislature or by any law to make and enter the order of July 20, 1906, herein complained of.

3. That said court erred in rendering judgment against these defendants upon the pleadings in said cause; said judgment is contrary to law and the facts as presented by said pleadings.

4. That said court erred in holding that the Act of the General Assembly of the Commonwealth of Kentucky, approved March 10, 1900, and the order of the Railroad Commission of Kentucky promulgated July 20, 1906, herein complained of, irrespective of any claim that it is confiscatory, violate the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States which prohibit any State from depriving any person of property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws and in holding that said order of said Commission, as far as it is made applicable to complainant is either null or void and in directing that the Special Commissioner so report.

5. That said court erred in rendering a perpetual order of injunction against these defendants and their successors in office and said Commission, enjoining and restraining them from continuing said order of said Commission made June 20, 1906, and promulgated July 20, 1906, and from putting the same into force or effect, and from enforcing or attempting to enforce the same as far as it is made applicable to complainant or as relates to the lines of railroad owned or operated by complainant in the State of Kentucky.

6. That the said court erred in adjudging that these defendants be further enjoined to revoke and cancel said order as far as it prescribes or attempts to prescribe for complainant a schedule of maximum rates styled "Maximum Rates, Kentucky Railroad Commission's Standard Tariff No. 1," applicable to complainant and its said lines of railroad in Kentucky.

7. That the said court erred in overruling defendants' objections to complainant's motion and grounds upon which motion and grounds the decree herein was rendered; and in overruling defendants' motion that on the face of the pleadings an order be entered dismissing this action; and said court further erred in sustaining complainant's said motion and grounds of motion, as follows:

(a) That said Act of March 10, 1900, undertakes to vest in said Commission Legislative, Executive and Judicial powers in violation of Sections 27, 28, 109 and 135 of the Constitution of the State of Kentucky, and that said Act is, therefore, unconstitutional, null and void;

(b) That because said Act does not provide for an appeal to a court from the final order of said Commission nor for any judicial investigation, or judicial review of the question of the reasonableness of any rates fixed by said Commission for services thereafter to be rendered before it is required to put same into force and effect, such order deprives the carrier of its property without due process of law and denies to it the equal protection of the laws, in violation of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

(c) That the penalties imposed by said Act are so enormous as to render the Act on its face violative of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from depriving any person of property without due process of law or denying to any person within its jurisdiction the equal protection of the laws; and

(d) That said Act is unconstitutional and void because it undertakes to vest in said Commission the judicial power of adjudging a carrier guilty of extortion before fixing a rate which the carrier may charge and without affording an opportunity to be heard in any court and thereby deprives the carrier of its property without due process of law and denies to it the equal protection of the laws guaranteed by the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States; and

(e) That said Act undertakes to impair the obligation of an existing contract between complainant and the State of Kentucky in violation of Sub-section One, Section Ten, Article One of the Constitution of the United States; and

(f) That said Commission was not authorized or empowered to prescribe and establish schedules of maximum rates; and

(g) That the allegations of the complaints on which the order complained of was made were insufficient to give the Commission jurisdiction or to authorize it to make said order; and

(h) That said Commission had no power to forbid complainant from charging or receiving rates in excess of those embraced in any of its commodity tariffs which were or are less for the same distances than those shown in said Commission's Standard Tariff No. 1; and

(i) That said Kentucky Railroad Commission's Standard Tariff No. 1 was arbitrarily made applicable to complainant and was not made applicable for the same distances and on the same classes of freight to all other railroad companies operating lines in Kentucky and on that account that said order is unfair, discriminating and amounts to a denial to complainant of the equal protection of the laws in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, said Adam T. Siler, McD. Ferguson and L. P. Tarlton pray that the decree and order of

> the said Circuit Court of the United States for the Eastern District of Kentucky appealed from herein be reversed.

It will be observed from Error No. 7 and the lettered sub-divisions thereof, thus assigned by appellants' counsel, they have assumed that the court below sustained each and all of the several grounds presented in support of appellee's motion that the Special Commissioner be instructed to report that the order of said Commission herein complained of was and is void.

Following these grounds in the main in their order the appellee presents this

BRIEF OF ARGUMENT.

I.

JURISDICTION.

At the outset of appellants' brief (pp. 13-17) the jurisdiction of the court below is questioned in this case, on account of the averment which appellants erroneously assert is contained in Paragraph 20 of appellee's bill, as follows (R. 42-3):

> No power or authority had been vested in or conferred upon the appellants by the Act of March 10, 1900, or by any other law, to make the order fixing rates complained of.

It is claimed by appellants that this averment "struck from under this case every vestige of foundation for the claim of Federal Jurisdiction," because it negatives the idea that what the said Commission did was the

action of the State, and shows the jurisdiction of this suit does not arise under the Constitution or laws of the United States. In support of this proposition appellants cite among others the following authorities:

City of Louisville v. Cumberland Telephone & Telegraph Co., 155 *Fed.* 729;
Barney v. City of New York, 193 *U. S.* 437.

Were this allegation to be found in Paragraph XX of appellee's bill, and it was the only one in its entire bill concerning the power and authority of said Commission, or under which it assumed to act in making and promulgating the order complained of, and if it bore the construction sought to be placed thereon by appellants, there might be some plausibility in appellants' contention that the court below was without jurisdiction of this cause. But unfortunately for appellants the supposed quotation from that paragraph of appellee's bill is not to be found therein. The argument for appellants on the question of jurisdiction is founded upon a mistake as to what appellee has alleged in its bill. When Paragraph XX of appellee's bill is examined it will be found that appellee there alleges two propositions, according to its construction of the McChord Act and the statutes of Kentucky relating to the powers and authority of said Commission, viz.:

1. The said Commission has no power thereunder to make and fix a *classification of freight traffic* for and to be observed by appellee and other railroad carriers operating lines in Kentucky.

2. That said Commission has no power under these statutes to make, publish and establish a *schedule of maximum rates on freight traffic* for and to be observed by appellee and such other carriers.

This alleged want of power in these respects re-

sults, as appellee contends, from one of two facts, either the unconstitutionality of the McChord Act, or the provisions of that Act if constitutional.

The material averments of appellee's bill have already been elaborately set forth in the foregoing statement of this case, and need not be further referred to in order to show the Federal questions thereby raised and involved in this suit. It is plain from these averments that appellee's bill has been framed upon the theory that the McChord Act is unconstitutional and void, tested by the provisions of either the State or Federal Constitution, and that the order complained of was made and promulgated by said Commission under the power and authority conferred on that body by the McChord Act, whatever that may be, and that said order is void, not only because said Act is unconstitutional, but, even if said Act is valid, on the further ground that its enforcement would be confiscatory and deprive appellee of its property without due process of law, and would also (by its arbitrary discriminations between appellee and other railroad carriers in Kentucky) deny to appellee the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The facts showing a denial to appellee of the equal protection of the laws resulting from an enforcement of said order are more clearly and fully set out in the amended bill than in the original bill.

In passing on the question of jurisdiction the court below in its opinion said (R. 171):

> Question is made as to the jurisdiction of this court of this case on the ground that there is no diversity of citizenship. Under the decision in the case of *Raymond v. Chicago Traction Co.*, 207 *U. S.* 20, it would seem that this court has jurisdiction be-

> cause of the federal question raised in the claim that the action of the Railroad Commissioners was in violation of the 14th Amendment. If not, it has it because of the claim that said Act itself is a violation thereof.

The amended bill brings this case within the doctrine laid down by this court in the decision referred to in the opinion of the court below, for appellee therein expressly alleges, with respect to the arbitrary and unlawful classification of railroad companies, that the order complained of

> amounts to a denial by the State of Kentucky and said Commission, (which is one of the instrumentalities provided by said State, under its Constitution and laws, clothed with the powers of said State, and acting for and in its behalf) to complainant of the equal protection of the laws, in violation of the provisions of Section One (1) of the Fourteenth Amendment to the Constitution of the United States. (R. 153).

While a question of jurisdiction cannot be waived, it is manifest that appellants' learned counsel were thoroughly convinced the court below had jurisdiction of this cause from the fact that they filed no demurrer to either the original or amended bill. The raising of that question by them, for the first time, upon the submission of this cause for a final decree appears, therefore, to be simply an after-thought on their part.

It is submitted that the ruling of the court below sustaining its jurisdiction was correct.

Furthermore, the principle is well settled that where a Circuit Court of the United States once obtains jurisdiction of a cause, to may proceed to determine all questions involved therein, whether State or Federal.

Osborne v. Bank of United States, 9 *Wheat.* 822-23.
Elliott v. Peirsol, 1 *Pet.* 340.
Mayor v. Cooper, 6 *Wall.* 252.
Tennessee v. Davis, 100 *U. S.* 264.
Railroad Co. v. Mississippi, 102 *U. S.* 135, 141.
Fallbrook Irrigation District v. Bradley, 164 *U. S.* 154.
Omaha Horse Ry. Co. v. Cable Tram-Way Co. (*Opinion by Judge Brewer*) 32 *Fed.* 727, 729.
Peoples Savings Bank v. Layman, 134 *Fed.* 635, 641.
Michigan R. R. Tax Cases, 138 *Fed.* 223, 230.

Hence, the decree appealed from, holding the McChord Act, and the order of said Commission herein complained of, void, should be affirmed if the same is right and affords the equitable relief to which appellee is entitled, or if it may be upheld and sustained upon any of the grounds relied on in appellee's original and amended bills, whether arising under the Constitution and laws of the United States or the Constitution and laws of the State of Kentucky.

II.

THE MCCHORD ACT UNDERTAKES TO VEST IN THE RAILROAD COMMISSION, AN ADMINISTRATIVE BODY, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS, IN VIOLATION OF SECTIONS 27, 28, 109 AND 135 OF THE CONSTITUTION OF THE STATE OF KENTUCKY, AND IS, THEREFORE, UNCONSTITUTIONAL AND VOID.

In Paragraph V of the bill the unconstitutionality of the McChord Act tested by the State Constitution is expressly relied on.

It seems clear from what is there alleged, that the provisions of the McChord Act, in so far as they attempt to clothe the Kentucky Railroad Commission with judi-

cial powers, violate the Constitution, and are, therefore, void. Section 1 of said Act expressly provides that "it shall be the duty of the Commission to *hear* and *determine* the matter (of alleged extortionate rates) as speedily as possible;" that the Commission "shall hear such statements, arguments or *evidence,* offered by the parties, as the Commission *may deem relevant;* and should the Commission *determine* that the company or corporation is, or has been, *guilty of extortion,* said Commission shall make and fix a just and reasonable rate," etc. Furthermore, said Act provides that the order entered on the record book of said Commission, fixing a rate, "shall be in *full force and effect* at the expiration of ten days thereafter," etc.

In the language of Judge Evans in *Louisville & Nashville Railroad Co. v. McChord, et al.,* 103 *Fed.* 222:

> These matters all bear the marks of a judicial proceeding, and the fixing of a lower rate has all the appearance of inflicting that much punishment upon the party found "guilty of extortion" by this non-judicial body.

Again Judge Evans states (Ib. 223-4):

> The investigation of a complaint and the decision thereon by the Commission that the railroad complained of is "guilty of extortion," being the only way to put the Act in motion, the railroad is entitled to first have a *judicial* determination of the question of its guilt, *before* the rate can be lowered as a penalty for the act charged to have been committed. The Commission cannot *judicially,* nor by due process of law, determine the one question upon which its right to fix a lower rate must depend. * * * * Nothing short of a *judicial* proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty

of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping stone to ulterior penalties of great severity, which it is the obvious purpose of the Act to have inflicted. The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an *offense*, and lower its rates, alone, as the penalty of such *conviction*.

Further on he states (Ib. 226):

> The court is of the opinion that the Act violates the constitution of the state, in attempting to confer upon the commission what are judicial powers and functions, to-wit: the power, after complaint and notice given, to "hear and determine" that the railroad has been "guilty of extortion," and, as a consequence, after that finding, to further decide that the freight rate of that road for similar services shall be a lower figure. These steps, as they apply only to individual instances, and are not a method of fixing rates generally, constitute the very essence of a judicial proceeding and judgment.

The reasoning of the court in that case concerning this identical Act has never been set aside or overturned, nor has any competent court, State or Federal, ever held otherwise. Indeed, the Court of Appeals of Kentucky has never construed this Act or held it to be valid, nor did this Court in the case of *McChord v. Louisville & Nashville R. R. Co.*, 183 *U. S.* 483. The latter Court in that case simply held the action was prematurely brought, no rate having been fixed by the Commission, and directed the court below to dismiss it, no matter whether the Act aforesaid was valid or invalid, constitutional or unconstitutional. At the outset of his opinion Chief Justice Fuller in that case states (Ib. 494):

Conceding that the *mere fact* that a duly enacted law is *unconstitutional* does *not* entitle a party to relief by injunction against proceedings in compliance therewith, it is contended that ground of equity jurisdiction existed here in the want of adequate remedy by the ordinary processes of *law* for the threatened consequences of the exercise of the power to fix rates in multiplicity of suits and irreparable injury.

After enumerating all the grounds urged by the railroad company for coming into a court of equity to enjoin any action by the Commission, including the unconstitutionality of the Act itself, Chief Justice Fuller proceeds to say (Ib. 495):

> However all this may be, we think it is not to be doubted that these bills cannot be maintained if it appear that the Commission is charged with the duty of enforcing the orders it may enter fixing rates. The objection that before this is done, the Commission is required to exercise *judicial* functions in determining that the companies have charged or received more than a just and reasonable rate, goes to the *validity* of the act. The fixing of rates is essentially *legislative* in its character, and the general rule is that *legislative* action cannot be interfered with by injunction.

In concluding the opinion in that case the court said (Ib. 502):

> The result of these considerations is that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of *equity* interposition *before the rates are fixed at all.* Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record, *and we are not called on to dispose of other contentions of grave importance,* which were

pressed in argument, as if now requiring adjudication.

Decrees reversed and cases remanded to the Circuit Court with a direction to sustain the demurrers and dismiss the bills.

In Roberts v. Hackney, 109 Ky. 265, the court said (Ib. 268):

> But by Section 109 of the Constitution now in force, the judicial power of the Commonwealth is vested in the *courts* established thereby. These are the Court of Appeals, Circuit Courts, Quarterly Courts, County Courts, Justices' Courts, Police Courts, and Fiscal Courts. * * * * Under this imperative provision of the Constitution, *no judicial power* can be exercised by any other officer except those named, unless authorized by some other provision of that instrument.

In that case the chairman of the board of trustees of a town of the sixth class who assumed to discharge judicial powers under certain sections of the Criminal Code, was held to have done so without legal authority.

In *Pratt v. Breckinridge,* 114 *Ky.* 1, it was held, under Sections 27, 28, 109 and 135 of the Constitution, the Legislature has no power to create a board to try election contests, as such a board exercises judicial powers, and is, therefore, a court.

In appellants' answer, the allegation made by appellee that the McChord Act undertakes to vest the Commission with judicial powers, or to constitute it a court, is repeatedly denied. This was to be expected, for to have admitted that said Act should be so construed would have been a concession that it violated the provisions of the State Constitution. In Paragraph V of appellants' answer this express admission occurs (R. 81):

> Defendants admit that the Railroad Commission is not a court established by said Constitution *or otherwise,* nor is it vested with any *judicial* powers.

So, it becomes a question of construction of the McChord Act, and for appellee it is insisted that the construction placed thereon by Judge Evans in the case above referred to is correct; and as stated by Chief Justice Fuller in *McChord v. Louisville & Nashville Railroad Co.* 183 *U. S.* 495:

> The objection that before this is done (entering orders fixing rates) the Commission is required to exercise *judicial* functions in determining that the companies have charged or received more than a just and reasonable rate, goes to the *validity* of the Act.

That case was ordered by this court to be dismissed solely because it was prematurely brought—that is, before the Commission had adjudged an existing rate to be extortionate or fixed a new rate in lieu thereof. Here, however, the Commission had acted and exercised both judicial and legislative powers before this suit was brought, and the question of the *validity* of the Act was fairly and squarely before the court below, and this court is now called on to dispose of it, as well as "other contentions of grave importance," referred to by Chief Justice Fuller in the conclusion of the opinion in the former case, and requiring adjudication on the present appeal.

It will be observed that the McChord Act consists of only two branches. The first declares the contingency in which the Commission may act *judicially* and take from the railroad company, and thereafter assume for itself, the rate making power. The second provides a single method of enforcing the rates made by the Com-

mission in its *legislative* capacity in those cases where it has taken the rate-making power from the railroad company, which method of enforcement is by indictment of a grand jury in a criminal prosecution to inflict the heavy fines and penalties prescribed by the Act, both upon the company and upon its officers, agents or employes, varying from $500 to $5,000 for each offiense. No better definition can be found of what constitutes a judicial act, and of what constitutes a legislative act, with respect to the rates of a public service corporation, than that laid down by Mr. Justice Brewer in *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific R'y Co.*, 167 *U. S.* 499, as follows:

> It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a *judicial* act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a *legislative* act.

III.

NEITHER THE SAID STATUTE NOR ANY OTHER STATUTE OF THE STATE OF KENTUCKY PROVIDES FOR AN APPEAL TO A COURT FROM A FINAL ORDER OF SAID COMMISSION, NOR FOR ANY JUDICIAL INVESTIGATION OR JUDICIAL REVIEW OF THE QUESTION OF THE REASONABLENESS OF ANY RATE FIXED BY SAID COMMISSION FOR SERVICES OF A CARRIER THEREAFTER TO BE RENDERED, BEFORE THE CARRIER IS REQUIRED TO PUT THE SAME INTO FORCE AND EFFECT, BUT MAKES SUCH ORDER CONCLUSIVE AS TO THE SUFFICIENCY OF THE RATE THUS FIXED, AND THE CARRIER IS THEREBY DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE PROVISIONS OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is clear that by the provisions of the McChord Act, the final order of the Commission fixing a rate

which the carrier "may charge, collect or receive for like services thereafter rendered," is intended to be "in full force and effect at the expiration of ten days thereafter," without right of appeal or judicial investigation or review. Futhermore, no other statute of the State provides for an appeal or judicial review of the reasonableness of the rate thus fixed by the Commission. The carrier is compelled, therefore, to either put in such rate, although insufficient to afford a fair and just return upon the value of its investment devoted to intrastate traffic, and suffer the consequent loss, or disobey the Commission's order and risk the infliction of enormous fines and penalties.

If property is not to be taken without due process of law or for public use without just compensation, and yet its use is to be regulated and the prices obtained for the services its owner renders are to be controlled by order of the Commission or statute, there must be full opportunity for judicial examination of every such order or statute for the purpose of determining whether they go further than the limits fixed by the fundamental law which controls even the statute-making and order-making bodies. Thus it was said by this Court in *Chicago, Milwaukee & St. Paul R. Co. v. Minnesota*, 134 *U. S.* 458:

> The question of the reasonableness of a rate or charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the pubilc, is eminently a question for judicial investigation, requiring due process of law for its determination. *If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the proper-*

ty itself, without due process of law, and in violation of the Constitution of the United States.

In *Reagan v. Farmers Loan & Trust Co.*, 154 *U. S.* 399, Mr. Justice Brewer said:

> In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or for the public. This, as has often been observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held.

In *Louisville & Nashville R. R. Co. v. McChord*, 103 *Fed.* 224, Judge Evans stated:

> Nothing short of a *judicial* proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping stone to ulterior penalties of great severity, which it is the obvious purpose of the Act to have inflicted. The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an *offense*, and lower its rates, alone, as the penalty of such *conviction*.

Further on he said (Ib. 224-5):

Of the hearing upon the charge before the non-judicial administrative body, a species of notice and an opportunity to be heard as to the reasonableness and justness of the rates is given. But all that is thus done is preliminary to having a justification for the further step, if the railroad charges an excess rate over that thus fixed, of having it convicted of another and further extortion, without any provision in the act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just. No opportunity for such an investigation is afforded by the statute when the courts are given jurisdiction of the cases, and it is by no means certain that those courts would feel constrained to give the relief in the absence of an express statutory requirement. These considerations, therefore, seem to bring this case within the principle first above quoted from the opinion of the Supreme Court in the Minnesota case. If it had been the intention of the legislature to recognize the right to a judicial investigation of the reasonableness of the rates fixed under the provisions of the Act, and to afford an opportunity therefor before a conviction upon an indictment for extortion, it would have said so in unmistakable terms, in order that the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case, without a commissioner or adequate equipment to enforce it. It is indeed manifest from the entire scope and plan of the enactment, and its operation upon mere isolated cases only, that it was the purpose to exclude all inquiry upon that subject after the Commission had acted, and to enfore by rigorous and extravagant penalties the rates thus fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those

rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the Supreme Court, this purpose thus plainly written in the legislation must be fatal to its validity.

In *Chicago, M. & P. R. Co. v. Tompkins*, 176 *U. S.* 172, this Court said:

> Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men, and by this Court, in Yick Wo v. Hopkins, 118 U. S. 356, 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."
>
> When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, State or nation, *without any right of appeal to the courts*, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the constitution. (Citing authorities.)
>
> It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the

> inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. *The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates.*

If the question of the reasonableness of the rates of a railroad company cannot be so conclusively determined by the legislature or by the Commission under its authority as to preclude judicial inquiry, and if a railroad has the right of appeal to the courts for the final determination of that question, and the right to invoke such judicial inquiry and protection is guaranteed by the Federal Constitution, then clearly, if an act be so framed as to destroy or evade such judicial supervision, it must be held void if the guarantees of that Constitution are to be enforced. The McChord Act is of that description. From its language, if the railroad carrier does not put in force the reduced rate as ordered by the Commission, an indictment upon the recommendation of that body may be found against it, as well as against any officer, agent or employe who fails to do so, or charges a higher rate.

The only pleas allowable under the Criminal Code of Kentucky to an indictment are as follows (Sec. 172):

1. A plea of guilty.
2. Not guilty.
3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty.

A defense or proof to the effect that the existing rate of the carrier is reasonable, or that the rate fixed, in lieu of it, by the Commission is unjust or unreasonable would not be permitted by the Criminal Court under the plea of "not guilty" to an indictment against the carrier or any of its officers, agents or employes. Besides, if such a defense, or proof to sustain it, were allowed to be presented for the consideration of the jury in a criminal court, under the McChord Act, the question of reasonableness of the rate charged, collected or received by the carrier or officer, agent or employe indicted, after a verdict and judgment of *acquittal*, could not be pleaded as *res judicata* on the trial of another indictment in the same or another criminal court against the same carrier, officer, agent or employe for charging a higher rate on another shipment than that fixed by the Commission in the same schedule of maximum freight rates. Nor could a verdict and judgment of *conviction* in one criminal case be pleaded as *res judicata* by the Commonwealth on the question of the reasonableness of the rates fixed by the Commission.

Such a remedy, even if allowed by the Act in question does not afford the "due process of law" to which the carrier is entitled before its property or the use thereof can be taken by the State or the Commission acting for and in its behalf. A criminal court has no equity jurisdiction. It cannot grant a preliminary or perma-

nent injunction against the enforcement of unjust or unreasonable rates. Its powers and jurisdiction extend only over the carrier or person indicted. It has no power to appoint a commissioner to take evidence and to report thereon. The trials in such a court are before a jury. The machinery of a court of criminal jurisdiction is wholly unadapted to the trial and determination, in any authoritative or conclusive manner, of the question of the reasonableness or unreasonableness of a schedule of maximum freight rates prescribed for observance by a railroad carrier.

It is clear and it is conceded by appellants' counsel that upon the trial of an indictment the determination of the reasonableness of the Commission's rate, if that question can be then inquired into, is wholly for the jury. Section 353 of the Criminal Code of Practice of Kentucky, dealing with the subject of appeals in misdemeanor cases, is as follows:

> The judgment shall be reversed for any error of *law* appearing on the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

It is settled by the decisions of the Court of Appeals of Kentucky that if there be *any* evidence to sustain a judgment of conviction that judgment will not be reversed on the ground that it is against the evidence. (*Patterson v. Commonwealth*, 86 *Ky.* 313; *Franklin v. Commonwealth*, 92 *Ky.* 612).

The hopelessness of submitting a question of this character to the jury, and permitting it to go at large into an investigation of the history and financial condition of a railroad company, the nature and extent of its revenues and expenses, and the propriety of all the elements of each, is such that the question has never

to our knowledge been actually submitted to a jury even in a civil case, although it is a common law principle that there may be recovered from a carrier any excess charged by him over a just and reasonable rate.

In *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 *U.S.* 460, Mr. Justice Miller concurring said:

> The proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of a just compensation for the service rendered.

In *Reagan v. Farmers Loan & Trust Co.,* 154 *U. S.* 394, Mr. Justice Brewer distinctly recognizes that the court applied to must have and should exercise the power to issue a preliminary injunction, in a proper case, for the carrier's protection during the pendency of the suit to settle and determine the reasonableness of a body of rates prescribed for a railroad company, as follows:

> The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property, that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly

changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable and oppressive regulations may be prescribed by the commission.

In *Smyth v. Ames*, 169 *U. S.* 518, Mr. Justice Harlan said:

> The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. *Only* a court of equity is competent to meet such an emergency and determine, *once for all* and without a multiplicity of suits, matters that affect not simply individuals but the interests of the entire community.

This Court in *Detroit v. Detroit Citizens Street R. Co.*, 184 U. S. 381, repeated with approval the language of Mr. Justice Harlan last quoted, and said:

> *Only* a court of equity is competent to meet such an emergency, etc.

Nothing could be more erroneous than to say that regardless of the appropriateness of the tribunal all that *due process* demands is "reasonable notice and a fair opportunity to be heard."

A very different definition of due process is that given by Judge Cooley:

> Due process of law *in each particular case* means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe *for the class of cases to which the one being dealt with belongs.*

Cooley's Const. Lim. (7th Ed.), 506.

The same author states that what may be sufficient due process in one case may not be sufficient in another (Ib. 502).

Mr. Justice Field in *Hagar v. Reclamation District*, 111 *U. S.* 708, in defining due process of law, states:

> It is sufficient to observe here, that by "due process" is meant one which, following the forms of law, *is appropriate to the case and just to the parties to be affected.* It must be pursued in the ordinary mode prescribed by the law; *it must be adapted to the end to be attained;* and wherever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought.

Mr. Justice Bradley, in a concurring opinion in the case of *Davidson v. New Orleans*, 96 *U. S.* 107, said:

> I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but "due process of law," provided by the State law when a citizen is deprived of his property; and that, in judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taking power, the power of eminent domain, or the power of assessment for local improvements, or none of these; *and if found to be suitable or admissible in the special case*, it will be adjudged to be "due process of law;" but if found to be *arbitrary, oppressive and unjust*, it may be declared to be not "due process of law."

The very familiar definition of "due process of law" which Mr. Webster formulated and which has been approvingly recognized by this Court (*Hovey v. Elliott*, 167 *U. S.* 418) declares in part:

> The meaning is that every citizen shall hold his life, liberty, property and immunities *under the protection of the general rules which govern society.*

In *Violett v. Alexandria,* 92 *Va.* 561, 569, the Virginia Court of Appeals quoted with approval the following language from the opinion of the Court of Appeals of New York:

> It may, however, be stated generally that due process of law requires *an orderly proceeding adapted to the nature of the case,* in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. We cannot conceive of due process of law without this.

And, again, in the same opinion, on page 572, an essential element of due process is declared to be a hearing "before some authority competent to afford relief in case of invalidity or injustice."

On page 573 it is recognized that the proceedings must be "appropriate to the nature of the case."

In the Minnesota case the rates fixed by the Railroad Commission were made enforcible by mandamus proceedings (a civil suit) in the Supreme Court of that State. The railroad carrier offered in that kind of a proceeding to show by evidence the rates prescribed for its observance were unreasonable, but the court refused to allow such evidence to be introduced, on the ground that under the statute of that State, the action of the Commission was final and conclusive on the question of the reasonableness of the rates prescribed. On the question of whether such a statute thus construed afforded due process of law, this Court said (134 U. S. 456):

> This being the construction of the statute by which we are bound in considering the present case,

> we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a *judicial* investigation by due process of law under the forms and *with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy,* and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, *cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.*

In the recent case of *Ex parte Young,* 209 *U. S.* 123, this court reiterated the principle that the only way by which the large property interests of railroad companies and other public service corporations can be protected from such legislative wreckings is by a bill in equity. In that case Mr. Justice Peckham said (Ib. 163-5):

> It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, *at least once,* after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

Another obstacle to making the test on the part of the company might be to find an agent or employe who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and upon conviction to a fine of five thousand dollars and imprisonment for five years. It is true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be re-

viewed by this Court. *Chicago, &c. Railway Co. v. Tompkins,* 176 *U. S.* 167. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

Again, in the same case it was said (Ib. 165):

> To await proceedings against the company in a State Court grounded upon a disobedience of the act, *and then if necessary obtain a review in this Court by writ of error to the highest State Court, would place the company in peril of large loss * * * if it should be finally determined that the act was valid.* This risk the company ought not be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people, who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts with the owners of all other kinds of property, no more, no less. *The courts having jurisdiction, Federal or State, should at all times be open to them as well as to others for the purpose of protecting their property and their legal rights.*
>
> All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, *and enjoining the enforcement of the act until the decision of the court upon the legal question.*

Again this Court states (Ib.-166):

> The question of sufficiency of rates is important and controlling, and being of a judicial nature it ought to be settled at the earliest moment by some court, and when a Federal Court first obtains jurisdiction it ought on general principles of jurisprud-

ence to be permitted to finish the inquiry and make a conclusive judgment to the exclusion of all other courts.

But it is said by appellants in their brief (p. 29) that the McChord Act does not *expressly forbid* the railroad carrier from going into a court of equity, either State or Federal, and obtaining relief by injunction against the enforcement of confiscatory rates prior to the expiration of the interim of ten days before such rates become effective. With respect to appellee's right to seek such relief in a Federal court of equity, it is not at all dependent upon State legislation, nor can that right be in any way abridged or denied by such legislation. It is a right guaranteed to appellee by the provisions of the Constitution of the United States. (Sec. 2, Art. 111).

It is contended by appellee, however, that the Act in question is void, because it does not provide for any appeal by the carrier to a State court or a judicial review of any kind of the reasonableness of railroad rates fixed by the Commission before they become effective. It is no answer to this objection to the constitutionality of the Act to say that the appellee has its remedy and actually resorted to it by bringing this suit in the court below. The very fact that the Act is unconstitutional on account of its failure to provide for an appeal or a judicial review furnishes one of the main grounds for the relief sought by appellee herein. Appellants' reasoning on this subject is fallacious. They argue, in effect, that any act of a State Legislature which denies or fails to provide for a judicial hearing in behalf of the carrier before its property rights are taken from it is constitutional, because such carrier has its remedy by suit in a Federal court of equity to enjoin its enforcement on the ground that such act violates the provisions of the Constitution of the United States. In other words, such an Act is

valid because the carrier may protect itself from its enforcement by resort by bill in equity to a Circuit Court of the United States.

Again, appellants in their brief, apparently in earnest, assert (p. 29):

> The complainant is endeavoring to have an adjudication in this action of a question (the reasonableness of the rates fixed by the Commission) which it confesses to be without the power of any court to hear. The complainant first invokes the aid of this court; it asks it to make a judicial investigation or review of the reasonableness of these rates; and at the same time asks the court to say that it has no power to make such investigation.

Now, appellants' learned counsel in offering this argument are hardly candid. In appellee's bill the claim is made that the McChord Act is unconstitutional and void, among other reasons, because it does not provide for an appeal to any court, or for any judicial review in behalf of the carrier, upon the question of the reasonableness of the rates prescribed, and consequently the order of the Commission made in pursuance of the provisions of that Act, reducing appellee's freight rates, is likewise void; but the further claim is made, in the event said Act shall turn out to be constitutional and valid, that the order aforesaid is nevertheless void, because the Commission exceeded its powers under said Act in prescribing a schedule of maximum freight rates, and because the rates prescribed thereby for appellee are confiscatory as well as discriminatory, and, therefore, deprive appellee of its property without due process of law, and deny to it the equal protection of the laws in violation of the Federal Constitution. The first claim presents a question of law arising upon the face of the Act, while

the second raises mainly questions of fact, dependent upon proof. The questions of law, under the stipulation of counsel, have already been decided in the court below in appellee's favor. The question of fact, so far as the alleged confiscatory character of the rates complained of is concerned, has not yet been decided by the court below, and should the decree appealed from be affirmed, it will not, as a matter of course, be necessary to take proof thereon or to decide the same. So counsel for appellants were as willing and anxious as counsel for appellee to enter into the stipulation referred to "with the view of saving time and expense incident to taking proof in this case, if it shall turn out that there are grounds upon which the case can be decided without such evidence." (R. 156.)

Furthermore, as counsel for appellants well know, it was provided and contemplated in that stipulation that the making of the motion by appellee for a submission of this cause on the questions of law arising upon the pleadings, the face of the McChord Act, and the order complained of, was

> Not to be construed as a waiver of any other ground of relief which complainant has asserted in its bill and especially is not to be considered as a waiver of the ground asserted in the bill that the rates fixed by the order are unreasonable and confiscatory. (R. 157).

But the contention of appellants that the McChord Act is valid, notwithstanding it is silent with respect to a judicial review, is not well founded. It is insisted for appellee that the right of the carrier to a judicial hearing before being compelled to put the rates prescribed by the Commission into effect must be expressly provided in the Act, else it will be invalid. This

essential cannot be left to the discretion of a State Court of equity, which may not grant appropriate relief. When the Hepburn Act, approved June 29, 1906, was before Congress the necessity of incorporating a provision therein granting the carrier a judicial hearing upon any rate fixed for it by the Commission, and allowing the same to be suspended before the carrier was required to put the same into effect, was discussed by the ablest lawyers in the Senate, and the conclusion was finally reached that the Act would be unconstitutional without such a provision. So Section 16 of the Act to regulate commerce was amended so as to contain the following provision:

> The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia, then the venue shall be in the district where said carrier has its principal office; *and jurisdiction to hear and determine such suits is hereby vested in such courts.*

In the recent decision in the case of *Louisville & Nashville R. R. Co. v. Central Stock Yards Co.*, 211 *U. S.* ———, decided January 25, 1909, in speaking of Section 213 of the Constitution of Kentucky, which requires, according to the construction given thereto by the Court of Appeals of that State, one carrier to deliver its own cars loaded with freight to another car-

rier at a point where there is a physical connection between their tracks, this Court said:

> It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. *The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. See Security Trust & Safety Vault Co. v. Lexington*, 203 *U. S.* 323, 333. *Roller v. Holly*, 176 *U. S.* 398, 409. *Connecticut River R. R. Co. v. County Commissioners*, 127 *Mass.* 50, 53. *Ash v. Cummings*, 50 *N. H.* 591. *Moody v. Jacksonville, Tampa & Key West R. R. Co.*, 20 *Fla.* 597. *Ex parte Martin*, 13 *Ark.* 198. *St. Louis v. Hill*, 116 *Mo.* 527. It follows that the requirement of the State Constitution cannot stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall.

In *Roller v. Holly*, 176 *U. S.* 409 (one of the cases cited in the opinion of Justice Holmes last quoted from) this court said:

The right of a citizen to due process of law must rest upon a basis more substantial than *favor* or *discretion.*

IV.

Review of Appellants' Authorities on the Proposition That the Essentials of "Due Process" are Only "Reasonable Notice and a Fair Opportunity to be Heard."

Appellant's learned counsel endeavor in their brief (pp. 75-81) to establish the proposition that "due process" in a case of this kind may be afforded without a judicial hearing or an investigation and decision by a court of justice, and have cited a number of authorities to sustain that position, which will be reviewed in the order in which they have been cited.

In *Reetz v. Michigan*, 188 *U. S.* 505, it was held that a State has power to make reasonable provisions for determining the qualifications of those engaged in the practice of medicine and for punishing those who attempt to engage therein in defiance of such statutory provisions. The State of Michigan had created "a board of registration in medicine," whose duty it was to hold specified meetings, and require all persons engaged in the practice of medicine and surgery to obtain from such board a certificate of registration, after passing a satisfactory examination or producing a diploma from a reputable college of medicine.

It was claimed said board had been given judicial powers, but the State Supreme Court had held that the Act creating the same, did not conflict with the State Constitution in that respect, which this court held to be conclusive of the question, and said it knew of no pro-

vision of the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or board of registration, the final determination of a legal question, adding, at page 507:

> Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not *necessarily* judicial process.

In support of this statement this court cited a number of authorities, and among others the case of *People v. Hasbrouck*, 11 *Utah* 305, where the same question was presented, and the court there said:

> The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise "judicial power," as that phrase is commonly used, and as it is used in the organic act, in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are nowise different in character in this respect from those excercised by the *examiners of candidates to teach in our public schools*, or by *tax assessors* or *boards of equalization* in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government.

In the Michigan case, however, this court referred to the fact that the proceedings of said board were not beyond investigation in the courts, as had been decided

by the Supreme Court of that State in *Metcalfe v. State Board of Registration*, 123 *Mich.* 661, where jurisdiction to entertain an application for mandamus to compel said board to register the petitioner was upheld. (Ib. 508-9).

In *Davidson v. New Orleans*, 96 *U. S.* 97, was involved the validity of a local assessment upon certain real estate for the cost of draining the swamp lands in the City of New Orleans. This court held that as the Act of the Legislature, which provided for such assessment, required that before it became effectual it must be submitted to a court of justice, with notice to the owners of the property assessed, all of whom had the right to appear and contest the assessment, it afforded due process of law. On that point this court by Mr. Justice Miller used the following language (Ib. 104-5):

> Whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, *in the ordinary courts of justice*, with such notice to the person, or *such proceeding in regard to the property as is appropriate to the nature of the case*, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

Further on he said (Ib. 105-6):

> It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, *by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case*. This was clearly stated by this court, speaking by the Chief Justice, in Kennard v. Morgan (92 U. S. 480), and, in substance, repeated at the present term, in McMillan v. Anderson (95 id. 37).

> This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; *and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court.* If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

The doctrine there laid down is entirely in harmony with the views of counsel for appellee in the case at bar.

Had the McChord Act provided "a fair trial in a court of justice, according to the modes of proceeding applicable to such a case" as this, the objection thereto that it is void on its face as not affording a railroad carrier that due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution, would not be urged by appellee.

In *Murray's Lessee, et al. v. Hoboken Land & Improvement Co.*, 18 *How.* 272. the facts showed that under an act of Congress, passed in 1820, a distress warrant was issued by the Solicitor of the treasury for the balance ascertained by the accounting officers of the treasury to be due the United States from one Swartwout, the Collector of Customs for the port of New York, and was levied by the Marshal of the United States for the District of New Jersey upon a tract of land in that State, which was sold by said Marshal to satisfy the distress warrant so levied by him thereon. The controversy arose between the defendant, as purchaser at that sale,

and the plaintiffs, as purchasers at a subsequent execution sale of the same land.

A suit in ejectment was brought by plaintiffs against the defendant to recover possession of the land thus sold upon the ground that the issuance of the distress warrant aforesaid was the exercise of judicial power by an executive officer and operated to deprive the said collector of his property without due process of law, and was, therefore, void under the provisions of the Fifth Amendment to the Federal Constitution. Upon this question, the judges of the court below being of opposite opinions, it was certified to this court for decision. This court, in passing on that question, held that in the case of a public officer, "the law of the land" (another name for "due process of law"), both in England and in this country, authorized the employment of Auditors, and an inquisition without notice, and a species of execution bearing a close resemblance to the warrant of distress provided by the Act of Congress under consideration, and made a diversity between public defaulters and ordinary debtors. This diversity in "the law of the land" it was stated, was well understood and it was held by this court (Ib. 278):

> entered into the legislation of the colonies and provinces, and more especially of the States, after the Declaration of Independence and before the formation of the Constitution of the United States.

So, the distress warrant, and the levy and sale of land thereunder, involved in that case were upheld as "due process of law," as between the Government and one of its collectors of customs. In so holding, this court said (Ib. 280):

> For, though "due process of law," generally implies and includes *actor, reus, judex,* regular alle-

gations, opportunity to answer, and a trial according to some settled course of *judicial* proceedings (citing authorities), yet, this is not *universally* true.

Again, this court in that case said (Ib. 281):

> We do not doubt the power of Congress to provide by law that such a question shall form the subject- matter of a suit in which the judicial power can be exerted. *The Act of* 1820 *makes such a provision for reviewing the decision of the accounting officers of the treasury.* But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

Still further, in drawing the distinction between proceedings for the ascertainment and collection of public dues, and those which should govern in other cases this court said (Ib. 282):

> It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others. which has sometimes been carried out by summary methods of proceeding. and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

In *Hagar v. Reclamation District,* 111 *U. S.* 701, a statute of California. which provided for the formation of reclamation districts and authorized a local assessment by commissioners upon lands within such a district, according to its value, for the cost of reclaiming swamp lands, was held to afford due process of law to the owner of land thus assessed, because, under the

statute, it was necessary to enforce the lien for the amount of the assessment by suit in the name of the district, in which suit the land-owner had the right to make defense. On that point this court said (Ib. 711):

> The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation District No.* 108 *v. Evans,* 61 *Cal.* 104.

In *Ex parte Wall,* 107 *U. S.* 265, on information a rule was issued against an attorney by the Circuit Court of the United States for the District of Florida, of which he had due notice, to show cause why his name should not be stricken from the roll of attorneys, because he had participated in the lynching of a prisoner. He appeared and excepted to the Court's jurisdiction, because (1) there was no charge against him under oath, and (2) the offense charged was a crime under the laws of Florida, for which he was liable to be indicted and convicted, but offered no testimony, although an eye-witness proved in open court his participation in the crime charged. After an order was entered prohibiting him from practicing law in that court, the attorney thus disbarred petitioned this court for a mandamus against the Judge of the court below to compel him to vacate the order of disbarment. This court held, how-

ever, that the summary proceeding employed by the court below was not for the purpose of punishment, but to preserve the courts of justice from the official ministration of persons unfit to practice in them, and, conceding that an attorney's calling or profession is his property, within the meaning of the Fifth Amendment to the Federal Constitution, he had not been deprived thereof, without due process of law.

In the course of his opinion in that case Mr. Justice Bradley said (Ib. 289):

> It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in *all* cases where property or personal rights are involved * * * * In all cases, that kind of procedure is due process of law which is *suitable and proper to the nature of the case, and sanctioned by the uses and customs of the courts.*

In *Wilson v. North Carolina*, 169 *U. S.* 586, a statute of North Carolina which authorized the Governor to suspend a railroad commissioner from his office, and to report the fact of such suspension, with the reason therefor, to the next General Assembly, and provided that the question of removal from office should be determined by a majority of that body, was held to be valid, the highest court of that State having held in a suit to try the title to the office in controversy that such statute did not violate the State Constituion, by which decision this court said it was concluded. This court, in discussing the writ of error to the Supreme Court of North Carolina in that case, held that no Federal question was involved, using this language (Ib. 593):

> The only question for us to review is whether the State, through the action of its Governor and judiciary, has deprived the plaintiff in error of his

property without due process of law, or denied to him the equal protection of the laws.

We are of opinion the plaintiff in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the Governor under the statute above mentioned, and resulting in his suspension from office.

The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a State office in a constitutional manner, as the State Court has held. What kind and how much of a hearing the officer should have before suspension by the Governor was a matter for the State legislature to determine, having regard to the constitution of the State. The procedure provided by a valid State law for the purpose of changing the incumbent of a State office will not in general involve any question for review by this court.

In *Wurts v. Hoagland*, 114 *U. S.* 606, it was held that a statute of New Jersey providing for the drainage of lands, and for the assessment by commissioners, after notice and hearing, of the expenses upon adjacent lands, did not deprive the owners of their property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. That statute provided that the report of such commissioners, showing their apportionment of the expenses, should be filed in the Supreme Court of that State, and after notice thereof had been published and an opportunity been given to all land owners to object thereto, said court was required to pass on such objections, in a summary manner, and correct or confirm the commissioners' report accordingly.

On that point this court said (Ib. 614-15):

All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners

> can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard *before the court* on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute: as well as before the commissioners, and, on any error in law or in the principles of assessment, *before the court*, upon the amount of the assessment.

In *Bauman v. Ross*, 167 *U. S.* 548, it was held that Congress, when appropriating land to public use for a highway, may direct the tribunal vested by law with the duty of assessing the compensation or damage due to the owner, whether for the value of any part taken or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; and that the estimate of just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury.

It was further held in that case that the legislature, in the exercise of the right of location, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby. On that point this court said (Ib. 590):

> If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taxen without due process of law.

In other words, the power there exercised and under like circumstances, involving the validity of taxes or local assessments was held to be purely *legislative.*

In *McMillen v. Anderson,* 95 *U. S.* 37, it was held that a State revenue law, which did not provide that a tax-payer shall have an opportunity to be present when a tax is assessed against him or that the tax shall be collected by suit, did not deprive such tax-payer of his property without due process of law.

On that question this court said (Ib. 41):

> Looking at the Louisiana statute here assailed —the act of March 14, 1873—we feel bound to say that, if it is void on the ground assumed, the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.
>
> But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall fail to refuse or pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license "be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property" of the delinquent, or so much as may be necessary to pay the tax and costs.

Furthermore, in that case this court referred to the fact that by another statute of the same State the taxpayer was given the right to enjoin and stay the collection of taxes wrongfully assessed, and such injunction suits were to be treated by the courts as preferred cases. (Ib. 42.)

In *Hurtado v. California*, 110 *U. S.* 516, it was held that "due process of law" in the Fourteenth Amendment to the Federal Constitution does not *necessarily* require an *indictment* by a grand jury in a prosecution by a State for murder, but such process was afforded where the Constitution of California authorized prosecutions for felonies by information, after examination and commitment by a magistrate, without indictment by a grand jury and the Penal Code of that State so provided.

In *Paulson v. Portland*, 149 *U. S.* 30, it was held that due process of law had been afforded a property holder whose lot had been assessed for his share of the cost of a sewer, where notice of the proceedings of the freeholders appointed to estimate the proportionate cost of such improvement had actually been given him, and the Supreme Court of the State had approved such proceedings, notwithstanding the doubt arising from the lack of an express provision in the statute or ordinance authorizing the construction of the sewer requiring notice thereof to be given the property owners.

In *Hibben v. Smith*, 191 *U. S.* 310, the validity of a local assessment for the improvement of a street was involved. It was held that due process had been allowed, where the owner of land assessed for a portion of the cost of such improvement had been given an opportunity to be heard before the body making the assessment, and that it was within the taxing power of the State Legislature to make the action of such board final and conclusive in such cases so far as the Federal Constitution is concerned.

In *Fallbrook Irrigation District v. Bradley*, 164 *U. S.* 112, a suit for an injunction was brought in the Circuit Court of the United States for the Southern District of California to enjoin the collector of an irrigation district from conveying by deed, in pursuance of a sale of land made by him for non-payment of a local assessment upon the land sold, in accordance with a statute of that State, providing for the incorporation of irrigation districts, and for the apportionment of the expense for the acquisition and distribution of water over the lands in such districts for irrigation purposes; and in the same suit the court was asked to set aside the assessment complained of, on the ground, among others, that the appellees had been deprived by the State of their property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution. The Circuit Court granted the relief prayed for, and held the statute unconstitutional on that ground. (62 Fed. 948.)

This court, however, reversed the decree appealed from, and held that by the act the land owners had been granted the right to be heard before the board of supervisors upon the question of benefits, and also upon the question of the valuation of and assessment upon their lands. On that point this court said (Ib. 168):

> We are of opinion that the decision of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact *of such a nature* this court has the power to review the decision of the State tribunal, which has been pronounced under a statute providing for a hearing on notice. The erroneous decision of *such a question of fact* violates no constitutional provision * * * * Due process of law is not violated, and the equal protection of the laws is given, when the *ordinary course is pursued*

> *in such proceedings for the assessment and collection of taxes that has been customarily followed in the State,* and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute.

This court refers to the fact that the Supreme Court of California had decided the action of the board upon any question of fact as to the contents or sufficiency of the petition to establish an irrigation district, or upon any other fact of a jurisdictional nature, was open to review in the State courts, although upon the question of fact as to benefits, decided by the board, its decision was conclusive (*Modesto Irrigation District Directors v. Tregea,* 88 *Cal.* 334); and then adds (Ib. 169):

> Whether a review is or is not given upon any of these questions of fact (if the tribunal created by the State had power to decide them, and if an opportunity for a hearing was given by the act) is a mere question of *legislative* discretion. It is not constitutionally necessary *in such cases* to give a rehearing or an appeal.

In *Spring Valley Water Works v. Schottler,* 110 *U.S.* 347, the question of the reasonableness of water rates was not involved. The sole question there considered and decided by this Court was the validity of an Act of the California Legislature, which substituted a commission to fix the rates to be charged by the water company, selected without the co-operation of the company, for the commission provided for that purpose in the company's original charter, which was to be made up of two persons selected by the company, two by the public authorities of the locality, and, if need be, a fifth selected by the other four or by the sheriff of the county. This Court, as well as the Supreme Court of that State, sustained the validity of the Act on the ground that the power to alter

general laws providing for the organization of corporations had been reserved in the Constitution of California adopted in 1849, and, as the Spring Valley Water Works had been incorporated under the general laws of that State in 1858, no irrepealable contract had been made thereby between that company and the State with respect to the method of selecting the commission empowered to fix the rates of the company.

In the course of Chief Justice Waite's opinion in that case, he said (Ib. 354):

> That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*, 94 *U. S.* 113. As was said in that case, such regulations do not deprive a person of his property without due process of law. What may be done if the municipal authorities do not exercise an honest judgment, *or if they fix upon a price which is manifestly unreasonable*, need not now be considered, for that proposition is not presented by this record. The objection here is not to any *improper prices* fixed by the officers, but to their power to fix prices at all.

The case of *Iowa Central Ry. Co. v. Iowa*, 160 *U. S.* 389, was dismissed by this Court for want of jurisdiction. As stated in the opinion, the railway company's contention was that the proceeding instituted against it in the Supreme Court of Iowa was an action for a mandamus, and that no such action could lawfully be brought to compel it to operate the leased part of its road until its legal duty to do so had been previously determined by the verdict of a jury. There was no assertion that the court below had no jurisdiction of the subject-matter. No Federal question was raised by the company's answer. In the brief of its counsel, however, it was claimed it

would be a violation of the Fourteenth Amendment to the Federal Constitution to grant the order prayed for upon the motion for a mandamus, instead of by another and less summary form of action. In dealing with this question this Court, by Mr. Justice White, said (Ib. 393):

> But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations enforced, provided the method of procedure adopted for these purposes gives reasonable notice and *affords fair opportunity to be heard before the issues are decided.* This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form santioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words.

In *Louisville & Nashville R. R. Co. v. Schmidt*, 177 *U. S.* 230, the last case cited by appellants to sustain their contention as to what constitutes due process of law, it was held that, although the Louisville & Nashville Railroad Company had not been formally proceeded against as a party defendant to the action, it had in substance volunteered in the cause to defend the same in the name of a technical defendant; had carried on the defense through its own counsel, had paid all the expenses of the litigation; the officers of the corporation which was a technical defendant being its officers, and, therefore, the Louisville & Nashville Railroad Company had had under the laws of Kentucky, as decided by the highest court

in that State (99 Ky. 143), due notice of the suit, and ample opportunity to defend, in fact had actually carried on the defense, and could hence be condemned by rule to pay the judgment.

In passing on the question of due process in that case, Mr. Justice White, in delivering the opinion of the court, said (Ib. 238):

> The mere fact that the proceeding to hold it liable was by rule does not conflict with due process under the Fourteenth Amendment, for, as we have seen, forms of procedure in the State courts are not controlled by the Fourteenth Amendment, *provided the fundamental rights secured by the amendment are not denied.*

It is submitted that none of these decisions of this Court, relied on by appellants, is applicable to a case like the one at bar, nor does any principle laid down in either of them militate against the contention made in appellee's behalf that the McChord Act is void on its face, as not affording due process of law, by reason of the fact that the carrier is not expressly granted a hearing by appeal or otherwise to a court of justice upon the question of the reasonableness of the rates fixed for its observance by the Commission, before being compelled to put the same into force and effect.

V.

THE SAID ACT IMPOSES SUCH ENORMOUS FINES AS A RESULT OF AN UNSUCCESSFUL EFFORT TO TEST THE VALIDITY OF THE SAME, OR OF ANY FINAL ORDER OF SAID COMMISSION FIXING A RATE FOR THE SERVICES OF A CARRIER TO BE THEREAFTER RENDERED, AS TO RENDER SAID ACT, ON ITS FACE, VIOLATIVE OF THE PROVISIONS OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PROHIBITING ANY STATE FROM DEPRIVING ANY PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW, OR DENYING TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

On the subject of burdensome penalties which preclude a resort to the courts to determine the reasonableness of rates Mr. Justice Brewer in *Cotting v. Kansas City Stock Yards Company*, 183 *U. S.* 100, said:

> Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?

Again at page 102 he said:

> It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the

party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

The foregoing extracts from the opinion in that case were quoted in the recent case of *Ex parte Young* by Mr. Justice Peckham reported in 209 U. S. 123, who, after doing so, proceeded at page 146 to state:

> The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents or employes of the company, the risk of imprisonment for years as a common felon.
>
> See also *Mercantile Trust Co. v. Texas etc. Ry. Co.*, 51 *Fed.* 529-543; *Louisville, &c. R. R. Co. v. McChord*, 103 *Fed.* 216-223; *Consolidated Gas Co. v. Mayor*, 146 *Fed.* 150-153. In *McGahey v. Virginia*, 135 *U. S.* 662-694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all *the law is invalid*, although what is termed a remedy is in fact given. See also *Bronson v. Kinzie, I How.* 311, 317; *Seibert v. Lewis*, 122 *U. S.* 284. If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, &c. Ry. Co. v. Minnesota*, 134 *U. S. supra.* A *law* which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, *is also unconstitutional.* It may therefore be said that when the penalties for disobedience are by fines

so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, *to close up all approaches to the courts,* and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and, therefore, invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a *fact* which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which *the jurisdiction of the legislature is complete in any event.*

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either

for freight or passengers, by imposing such enormous fines and possibly imprisonment as a resullt of an unsuccessful effort to test the validity of the laws themselves, *are unconstitutional on their face, without regard to the question of the insufficiency of those rates.*

By the McChord Act, should a railroad company, or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense any sum not less than five hundred ($500) dollars, nor more than one thousand ($1000) dollars, and, upon a second conviction, in any sum not less than one thousand ($1000) dollars, nor more than two thousand ($2000) dollars, and for a third and succeeding convictions in any sum not less than two thousand ($2000) dollars, nor more than five thousand ($5000) dollars.

The said Act further provides that the Circuit Court of any county into or through which the line or lines of railroad carrying such passenger or freight, owned or operated by such railroad company or corporation, and the Franklin Circuit Court, in said State, shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

In discussing the excessive penalties presented by the McChord Act appellants in their brief (pp. 69-70) say:

> We have heretofore endeavored to show the carrier has the option:

First, to obey the Commission's order and charge rates not in excess of those fixed by the order;

Second, institute a suit in equity either in the State or Federal Court within the ten days before the order becomes effective, or thereafter before the Commission has recommended that indictments be found, and try the question just as is being done in this case;

Third, decline to avail itself of equitable relief, *take chances* on the Commission not recommending indictments, and, should indictments be found, raise the constitutional questions by way of defense to the indictments.

The first course would mean an unqualified surrender of the carrier's rights to the Commission's rates, however confiscatory or discriminatory they might be.

The second course, so far as it relates to the carrier's right to institute a suit in a Federal court of equity, such as this, is not, as already observed, by virtue of the Act or founded upon any provision therein, nor could it be appellee's right to come into the court below to contest the validity of the rates prescribed is based on the Federal Constitution and laws. The same access to the Federal Court could be had and was availed of by the complainants in the *Minnesota cases,* 134 *U. S.* 418, *and* 209 *U. S.* 123, but, nevertheless, this Court held the State statutes complained of therein to be unconstitutional and void.

The Act in question makes no provision for a suit by the carrier in a State court of equity, or any other court, to determine the reasonableness of the rates fixed by the Commission, or to supersede, suspend or enjoin their enforcement until that question of fact can be decided. It would, therefore, be entirely within the discretion of a State court of equity to withhold such relief, pending the suit. Appellee insists that the Act itself should provide expressly for an adequate judicial remedy, and

that it is entitled thereto *as a matter of right,* in the administration of "due process of law." If the State court of equity should refuse, as it may at the instance of the carrier, to enjoin the Commission from enforcing the rates prescribed by it, or to allow the carrier to supersede or suspend their operation pending the suit or until the question of reasonableness can be finally determined, by the execution of a bond or on other equitable terms, the rates complained of would go into full force and effect at the end of ten days after notice to the carrier or one of its employes. Meantime, the carrier would be at the mercy of the Commission.

The third course, suggested by appellants' learned counsel, that the carrier "*take chances* on the Commission not recommending indictments;" in other words, on the Commission not discharging its official duty, would be taking a fearful risk, which might result disastrously, not only for itself, but for its officers, agents and employes. But it is further suggested by appellants, if indictments are found, the carrier can "raise the constitutional questions by way of defense thereto." That is an extremely doubtful proposition. Nothing in the Act so provides, and if it contained such a provision, it would be simply a travesty of judicial procedure.

The appellee, as alleged in its bill, owns and operates its lines in 54 counties of Kentucky. It has over 700 stations on these lines, at perhaps 500 of which it has agents whose duty it is to charge, collect and receive rates on intrastate freight. Thus, all of these agents may be indicted by grand juries on the Commission's recommendation, in their respective counties for having in one day, perhaps the same day, charged, collected or received a higher rate on a separate intrastate shipment than that fixed therefor by the Commission. The penalty against each of them on conviction for the first offense cannot be less than $500, and may be $1000.

Thus fines aggregating from $250,000 to $500,000 might be imposed upon appellee's freight agents in Kentucky for one day's violations by each, or for their first offense. Accepting the construction in their brief (pp. 70-73) which appellants place on the penalty clauses of the McChord Act, that the second offense to be punishable must be committed after the first conviction, the possible fines inflicted on appellee's agents therefor could not be less in the aggregate than $500,000, and might reach $1,000,000, and upon a third and each succeeding conviction they would amount to not less than $1,000,000, and might be as much as $2,500,000. These enormous burdens do not take into consideration the penalties which might be imposed upon the appellee itself and its officers, under the provisions of the Act. So, it is plain the doctrine laid down by this Court in *Ex parte Young, supra*, with respect to the Minnesota statute, is applicable to the penalty features of the McChord Act, which were clearly intended to "close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the Commission's order are not too low, and, therefore, invalid." The intended intimidation is as complete in the one case as in the other. While it is true no indictment against the carrier can be found by a grand jury unless recommended by the Commission (*Illinois Central R. R. Co. v. Commonwealth*, 23 *K. L. R.* 1159, 64 *S. W.* 975), the power is placed in its hands to set on foot hundreds of prosecutions against the carrier and its agents and employes at the same time in every county in Kentucky in which the carrier's lines are owned or operated, thus completely paralyzing and destroying the carrier's power to carry on its business, unless it puts into effect the rates prescribed.

The impossibility of submitting a question of this

character to a jury in either a civil or criminal court has been passed on in the following cases:

Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee, 19 *Fed.* 679;

Winsor Coal Co. v. Chicago & Alton R. Co., 52 *Fed.* 716;

Van Patten v. Chicago, etc. Ry. Co., 81 *Fed.* 545.

Upon the trial of indictments before juries, and in accordance with the ordinary criminal procedure, the railroad company would be given, according to the contention of appellants' counsel, the right of laying before the jury the complicated and intricate details of its operations and earnings for the purpose, if possible, of convincing the jury that the rate fixed by the railroad commission is unreasonably low. If in any case it succeeds in establishing this fact, it is simply relieved from the *penalty for that one shipment.* The rate still exists as a constant invitation to further indictments, and the company can have no assurance that the next jury may not decide on the same evidence that the Commission's rate is unreasonable. If in any case the company fails to satisfy the jury that the rate is unreasonably low, the result is not *to require* the railroad company to charge that rate for the future, or to furnish it with any certain guide as to whether it should do so, but is to impose upon it a very heavy penalty for its having done the only thing it could do in order to bring about a judicial hearing in the statutory method, i. e. refraining from charging the rate fixed by the Commission. Surely, if a railroad company has any real constitutional right to a judicial investigation as to the reasonableness of rates fixed by a commission, this sort of procedure is illusory and worthless. A favorable decision gives the company no protection for the future; an unfavorable decision imposes a heavy penalty upon it for having invoked judicial protection.

As a practical matter, therefore, the right, even if it exists, to have an inquiry upon the trial of an indictment into the reasonableness of the Commission's rate, would be absolutely of no value to the railroad company. The questions involved are so intricate, the results of jury trials, even of cases of the greatest simplicity, are so uncertain, and the penalties imposed are so severe that no railroad company could afford to refuse to comply with any rate which the Commission might make, and the result of the act, with any such construction, would be exactly what was the obvious purpose of the legislature—and that is, that the railroad companies should be *compelled* to charge the rates imposed by the Commission, no matter how low they might be.

But appellants say in their brief (p. 73) the *Ex parte Young Case* turned upon the proposition that the fines and penalties would be imposed "no prior hearing having ever been given," while in the case at bar appellee had a prior hearing, and "due process is particular only in demanding a *hearing* without regard to the *form* thereof." In using the phrase quoted by appellants, this Court in the case of *Ex parte Young*, manifestly meant no prior *judicial* hearing had been given. In "due process" the *form* of the hearing is in many cases of more importance than the hearing itself, where, to use the language of Mr. Justice Peckham in the case last referred to

> the validity of the Act depends upon the existence of a *fact* which can be *determined* only *after investigation* of a very complicated and technical character.

By this is meant a *judicial* investigation, for he is there pointing out the distinction, which he states is obvious, between an act, the validity of which depends on the existence of a *fact*, and "the ordinary case of a

statute upon a subject requiring no such investigation and over which the *jurisdiction* of the *legislature is complete in any event.*" The provisions of the former class of acts, relating to the enforcement of rates, which impose enormous fines "as a result of an unsuccessful effort to test the validity of the laws themselves, *are unconstitutional on their face, without regard to the insufficiency of those rates.*

VI.

SAID ACT, WITHOUT ATTEMPTING TO REPEAL THE CHARTER OF THE APPELLEE, WHICH FIXES MAXIMUM RATES IT MAY CHARGE FOR ITS SERVICES, ATTEMPTS TO EMPOWER AND AUTHORIZE SAID COMMISSION TO SUBJECT IT TO CRIMINAL PROSECUTION AND HEAVY PUNISHMENT FOR CHARGING THE RATES AUTHORIZED IN ITS CHARTER.

In Paragraph II of its bill complainant sets out the maximum rates it is authorized to charge by its charter, which are in excess of those attempted to be prescribed by the Commission.

In *Louisville & Nashville R. R. Co. v. Commonwealth,* 99 *Ky.* 134-5, the court, after holding Sections 816 and 819, Ky. Statutes, defining and prescribing the punishment of a railroad corporation for the offense of extortion in charging, collecting or receiving more than a just and reasonable rate, to be unconstitutional and void, concluded its opinion as follows:

> It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, *not* because such rates are secured by an *irrepealable contract,* a matter not now con-

sidered, *but simply because they at least remain the legal rates until changed by law.*

In *Louisville & Nashville R. R. Co. v. McChord*, 103 *Fed.* 225-6, the court on this point said:

> As applying especially to the Louisville & Nashville Railroad Company, the court is further of opinion that the act cannot be maintained, because, without attempting directly, and probably not at all, to repeal the provision of the charter of that company as to maximum rates, it still leaves it within the power of the Commission to make it a crime for that railroad to charge the rates which its charter expressly authorizes. Again, it is not to be inferred that, even if the charter of this company can be amended, it was done by implication by the act before us.

Again, referring to the fact that appellee's charter was enacted prior to the reservation statute of 1856, the court, in that case, raises a doubt as to whether its charter rates can be affected by subsequent legislation at all, without its consent, and proceeds to say:

> But whether so or not, it can only be done, if at all, by language which is plain and unmistakable, and not merely by so doubtful an implication as is presented here.

VII.

SAID ACT AND ORDER COMPLAINED OF UNDERTAKE TO IMPAIR THE OBLIGATION OF THE EXISTING CONTRACT BETWEEN APPELLEE AND THE STATE OF KENTUCKY, WHEREBY, UNDER APPELLEE'S LEGISLATIVE CHARTER AND THE AMENDMENTS THERETO, APPELLEE IS AUTHORIZED AND EMPOWERED TO CHARGE AND COLLECT FOR THE TRANSPORTATION OF GOODS, MERCHANDISE AND PROPERTY OF ANY KIND ANY SUM ON ITS RAILROAD IN KENTUCKY NOT EXCEEDING THE MAXIMUM RATES PRESCRIBED BY THE PROVISIONS OF ITS SAID CHARTER AND THE AMENDMENTS THERETO, WHICH HAVE NEVER BEEN REPEALED BY THE GENERAL ASSEMBLY OF KENTUCKY, AND ARE STILL IN FULL FORCE AND EFFECT, AS SET FORTH IN PARAGRAPH II OF ITS ORIGINAL BILL, WHEREAS THE MAXIMUM RATES ATTEMPTED TO BE PRESCRIBED BY THE ORDER COMPLAINED OF ARE FAR LESS THAN THOSE PRESCRIBED BY ITS SAID CHARTER AND THE AMENDMENTS THERETO ON THE SAME KIND OF COMMODITIES AND PROPERTY FOR THE SAME DISTANCES, IN VIOLATION OF THAT PROVISION OF SUB-SECTION ONE (1), SECTION TEN (10), ARTICLE ONE (1), OF THE CONSTITUTION OF THE UNITED STATES, WHICH DECLARES "NO STATE SHALL PASS ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS."

While the complainant may not, since its acceptance of the provisions of the Constitution in 1902, have an irrepealable contract with the State to charge and collect the rates fixed in its charter, it certainly still has a contract right to charge and collect those rates until that charter provision shall be expressly repealed by an act of the Legislature. No repeal of its said charter provision can be implied from anything contained in the McChord Act, or any order of the Commission thereunder.

See *Pingree v. Michigan C. R. Co.*, 118 *Mich.* 314, 76 *N. W.* 635.

In this connection the opinion of the Kentucky Court of Appeals, delivered June 12, 1908, in the case of *Louisville & Nashville Railroad Co. v. Robbins*, 33 *Ky. Law Rep.* 778, 111 *S. W.* 283, is in point. In that case a judgment was rendered by the Bullitt Circuit Court requiring the appellant, the Louisville & Nashville Railroad Company, to provide for appellee, Robbins, a proper wagon-way across its right of way and railroad track so so as to enable him to pass from one side of the railroad to the other, as he owned land on each side thereof, the duty to so provide such farm crossings being imposed upon appellant by its charter. But appellant set up the fact that it had in 1902 accepted the provisions of the present State Constitution, and that by reason thereof the provisions of its charter requiring it to construct farm crossings were repealed by the Kentucky Statutes on that subject, and those statutes, which were different and not so onerous, took the place of said charter provisions. The court, however, took a different view and said:

> In our opinion, the laws found in the Kentucky Statutes, with reference to farm crossings, were not intended to and did not have the effect to repeal the provisions of appellant's charter referred to. Appellant obtained its right of way through the State by virtue of its charter, it received donations of right of way, purchased and condemned the balance of the right of way, with the provision in its charter requiring it to construct such farm crossings, thus entering into and forming a part of the contract by which it obtained the right of way upon which to construct its road. This was an inducement, probably, to some to give right of way and induced others to sell at a less price, and in all proba-

bility lessened verdicts in cases in which it condemned the right of way, and it cannot evade this liability which it assumed when it accepted its charter.

For these reasons the judgment of the lower court is affirmed.

Now, if complainant must still bear the burdens and liabilities imposed upon it by its charter, notwithstanding its acceptance of the new Constitution, it is likewise entitled to the benefits and privileges granted by its charter, and nothing short of an *express and absolute repeal* by an act of the Legislature can take away or destroy its right to charge and collect the maximum freight rates prescribed in its legislative charter, for that provision, too (as does the provision concerning farm crossings), still forms "a part of the contract" with the State, although such contract, in that respect, is subject to the right of the State to repeal it, but which right the State has not yet exercised by express enactment, nor by necessary implication from any existing general statute.

Practically all the authorities referred to in appellants' brief (pp. 100-137) on this branch of the case are cited to support the proposition that the State of Kentucky did not make an *irrevocable* contract with appellee in granting it the right to charge and collect certain maximum freight rates as set out in its charter and the amendments thereto enacted prior to the reservation Act of 1856. Many of these cases, however, do not sustain appellants' contention in that respect, but do support a different view, notably the *Sanford Case*, 164 *U. S.* 586, where the contract was not upheld because this Court held it had not passed from the old to the new company. Since appellee in 1902 accepted the provisions of the present State Constitution, it is not insisted that

it is any longer beyond the power of the Legislature to expressly repeal those provisions in its charter granting it the right to charge and collect certain maximum freight rates. It is claimed, however, that the Legislature has not yet exercised that power, and so long as it refrains from enacting such a repealing statute, its contract with the State in that respect remains unimpaired, and this is practically decided in the case of *Louisville & Nashville Railroad Co. v. Commonwealth*, 99 *Ky.* 142-3; *same v. Robbins*, 33 *Ky. Law Rep.* 778, 111 *S. W.* 283; *same v. McChord*, 103 *Fed.* 216, 225. These cases correctly hold in efect that appellee's charter privileges have not been and cannot be repealed by implication or general laws not made expressly applicable thereto.

VIII.

NEITHER UNDER THE TITLE NOR THE PROVISIONS CONTAINED IN THE BODY OF SAID ACT, IS SAID COMMISSION AUTHORIZED OR EMPOWERED TO PRESCRIBE AND ESTABLISH SCHEDULES OF MAXIMUM RATES OR TARIFFS FOR THE SERVICES OF RAILROAD CARRIERS, AS IS ATTEMPTED TO BE DONE BY THE ORDER PROMULGATED JULY 20, 1906, HEREIN COMPLAINED OF.

The principal object of the McChord Act of March 10, 1900, was to amend Section 816 Kentucky Statutes, which had been theretofore held by the Court of Appeals to be unconstitutional and void. (*L. & N. R. R. Co. v. Mc Chord*, 99 *Ky.* 132.) There is no suggestion in either the title or body of this Act looking to the granting of power to the Commission to make schedules of maximum rates. By the terms of the Act the order of the Commission fixing a rate was to be in full force and effect after ten days' notice of the fixing of a rate upon a separate complaint and after investigation as to each single rate.

Had it been the intention to give the Commission power to establish schedules of maximum rates, this short notice would not have been prescribed, for it is manifest a shedule of maximum rates for any railroad company in Kentucky, let alone the Louisville & Nashville Railroad Co. with its 1300 miles of road and 700 stations in that State, could not be published and put into force and effect within that brief period. Besides, the Legislature must be presumed to have had before it at the passage of this Act the acts of other States creating railroad commissions and defining their powers, and apt and clear language about which there could be no mistake, would have been employed, if it had been the intention to clothe the Commission with this important and far-reaching power. No railroad commission of any State has ever undertaken to assume the power of prescribing and establishing schedules of maximum rates, unless such power had been expressly granted by the legislature.

Powers of railroad commissions are limited and the statutes granting such powers must be strictly construed.

In *Chicago, I. & L. R'y. Co. v. Railroad Commissioners of Indiana,* 38 *Ind. App.* 439, the court, page 459, states:

> The power possessed by the Commission is only such as the statute gives it. The method by which it is to proceed is pointed out. If this method is not pursued its action is a nullity. The whole proceeding is a special statutory one and certain steps must be taken before the Commission has any authority to proceed.

In *State v. Chicago, M. & St. P. R'y Co.,* 16 *S. D.* 517, *S. C.,* 94 *N. W.* 407, the court said that railroad commissions "are mere creatures of the statute and possess no power except what the statute expressly confers upon them."

In the *Board of Railroad Commissioners v. Oregon Railway & Navigation Co.*, 17 *Or.* 65, 19 *Pac.* 702, it is said at page 75 of the former, and 706, 707 of the latter:

> The jurisdiction of such commissions is not given by implication. Commissions of that character are creatures of the statute and possess no power except what the statute expressly confers upon them.

In *Interstate Commerce Commission v. C. N. O. & T. P. R'y Co.*, 167 *U. S.* 479, the Act to Regulate Commerce as originally enacted was construed and the court held that Congress had not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute, and as it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what, in reference to the past, was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

In the course of Mr. Justice Brewer's opinion in that case he states (Ib. 494):

> The question debated is whether it vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication.

Following this clause in the opinion the provisions of numerous State laws on the subject are quoted for the purpose of showing that such power in a railroad commission never exists, unless it has been expressly granted in language which needs no explanation or amplification. After quoting from these State statutes Mr. Justice Brewer proceeds (Ib. 500):

> Now, nowhere in the Interstate Commerce Act do we find words similar to those in the statutes referred to, giving to the Commission power to "increase or reduce any of the rates;" "to establish rates of charges;" "to make and fix reasonable and just rates of freight and passenger tariffs;" "to make a schedule of reasonable maximum rates of charges;" "to fix tables of maximum charges;" to compel the carrier "to adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given.

Further on he states (Ib. 505):

> We have, therefore, these considerations presented:
>
> First. The power to prescribe a tariff of rates for carriage by a common carrier is a *legislative* and *not* an *administrative* or *judicial* function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have frequently been used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct.

While under the McChord Act the power is given to the Commission to pass upon the reasonableness of a single rate and to substitute therefor one deemed by it just and reasonable to be thereafter charged by the carrier for a like service, it by no means follows that this limited power can be broadened by construction into the larger and more comprehensive power of prescribing schedules of maximum rates for all services thereafter to be rendered by the carrier for all distances between all stations and upon all commodities and classes of freight.

In *Chicago, B. & Q. R. Co. v. Dey*, 38 *Fed.* 656, Mr. Justice Brewer, then Circuit Judge, upon a motion for a preliminary injunction to restrain the Railroad Commission of Iowa from putting into effect a certain schedule of rates, construed the statute of that State as granting the power to establish schedules of maximum rates, but the language of the statute, construed in that case, was quite different from the McChord Act. In the Iowa statute under Section 17 the power was given to the Commission expressly to establish maximum rates. In the course of his opinion he stated:

> Now, the breadth of the inquiry is obvious from the matter of which complaint may be made. It is not simply a rate charged or published by any railroad company, which of course presupposes some action on the part of the company, but it may also be the maximum rates fixed by the commissioners in their shedule made under section 17; not necessarily a single rate for a single class of shipments, but generally of their maximum rates. In other words, the complaint may be narrowly of a single matter, or broadly of the rates fixed by the commissioners. Obviously, reading sections 17 and 18 together, the thought of the legislature was this: That under section 17 the commissioners should proceed in a legislative or administrative capacity, and, after

> giving notice generally, and not to any particular railroad company, and giving general opportunity to all for furnishing information, were to prepare schedules for all the roads, and then in order that the rates might be reduced to the lowest reasonable figure, it provided for complaint in section 16 against any particular road, and authorized the commissioners, after notice and hearing, to fix a schedule for that road, or determine the reasonableness of any particular charge. Only by giving this construction does it seem that full force can be given to all the words in section 18.

It is plain that if the statute considered in that case had only provided for a complaint "narrowly of a single matter," as the Kentucky statute does, the court would have said that the Commission had no power to make a schedule of maximum rates by a single order applicable to either one or all companies in the State. No case can be found where the statutes was like the McChord Act and was construed to give it the broad and extensive power to fix schedules of maximum rates for one or all companies on all classes of freight for all distances within the State.

Section 15 of the Act to Regulate Commerce as amended by the Hepburn Bill is substantially the same as the McChord Act, with the exception that the latter Act gives the Commission power to act concerning a single rate without complaint, but must give notice to the carrier before such rate can be condemned or another substituted therefor. No one has ever claimed or pretended since the passage of said amendatory act of June 29, 1906, that the Interstate Commerce Commission has power to precribe schedules of maximum rates for any or all interstate railroad companies in the United States. Indeed, such power in behalf of said Commission was expressly disclaimed in the debates when this measure was discussed in Congress, and the advocates thereof

repelled the suggestion that it was intended to clothe the Commission with power to prescribe schedules of maximum rates for interstate railroad companies.

In the proceeding which culminated in the order of July 20, 1906, complained of herein, the Kentucky Railroad Commission proceeded on complaint, however insufficient, and not on its own initiative or motion, but the McChord Act gives no broader power to the Commission where the Commission itself inaugurates the proceeding than it does where it is begun by the complaint of a shipper and notice to the carrier. The Kentucky Railroad Commission under the McChord Act has substantially the same power over intrastate rates as the Interstate Commerce Commission has over interstate rates—no more, no less. This Act gives to the Commission no power to revise or promulgate the entire body of intrastate rates to be charged and collected by any carrier in Kentucky.

As before stated, the McChord Act was intended to supply the defect in Section 816 Kentucky Statutes, which had been held void for uncertainty, and there is no more reason for supposing that it was intended to authorize omnibus complaints than there is for supposing that said Section was intended to authorize omnibus indictments or one indictment for many and numerous acts of extortion based on violations of divers and sundry rates fixed by the Commission in a schedule of maximum rates. The power to make a schedule of rates implies that the Commission is to consider what would be a fair return upon the carrier's investment devoted to intrastate traffic and to fix a body of rates which would yield such a return, thus adjusting the same so that they may not be disproportionate or discriminatory. The power, however, to determine merely whether a single rate is just or reasonable does not necessarily imply that the Commission is to consider whether or not the carrier is

earning a fair return upon its investment for the purpose of determining that question. The fact that no express power was given to the Commission to make schedules of rates authorizes the inference that the evil which the Legislature was aiming to correct was inequalities in rates, and that it was not willing at the time the McChord Act was passed to confer upon the Commission the power to inquire whether the railroad company were receiving more than a fair return upon their investments and to make schedules of rates which would yield only such return. There is no reason to suppose the Legislature intended to legislate for all future time upon this subject.

The McChord Act gives the Commission no power to increase any rate; therefore, when the entire body of rates has once been reduced to a point which yields the carrier barely a fair return upon its investment, the reduction of any rate means that the carrier will not receive a fair return on its investment, and yet the Commission under the provisions of that Act has no power to correct an inequality except by reducing a rate.

To use the language of another (Mr. Edward W. Hines, former General Solicitor of the appellee, who wrote an elaborate opinion on the scope of the McChord Act, assuming it to be valid):

> While the Commission may modify or revoke an order reducing a rate, it may be that the particular rate which it is necessary to increase in order to remove the inequality has never been reduced, and if that be true the inequality cannot be corrected without upsetting the entire schedule of rates. The mere fact, therefore, that the Commission has no power to increase any rate, or to prescribe a differential, seems conclusive that it was not intended by the Legislature to empower the Commission to make a schedule of rates. If the Commission has power, for the purpose of correcting inequalities, to increase rates which it has made, although it has no power to increase rates which the carrier has

made, it is not subject to any restrictions in the exercise of that power, and that fact is persuasive that there was no intention to confer such a power. One of the principal complaints against the rates of carriers is that they are unequal as between different localities, and if the Commission may make a schedule of rates, and then change rates at will for the purpose of correcting inequalities as between different towns and cities, without any restrictions as to notice and hearing, great injustice may be done to both carriers and shippers; and if the Commission may, after making a schedule of rates which is barely remunerative, still further reduce rates for the purpose of correcting inequalities, the property of the carrier will be taken without due process of law, even though there was notice and hearing before the Commission. All the provisions for reducing rates manifestly relate to rates fixed by the carrier, and if any power exists to change rates made by the Commission it exists only by virtue of the power conferred upon the Commission to revoke or modify its order reducing a rate; but, as we have seen, there is no restriction whatever upon the power of the Commission in that matter, and no provision is made for notice or hearing. It is unreasonable to suppose that the Legislature would not have prescribed the procedure for changing rates made by the Commission if it had been its intention to authorize the Commission to make a schedule of rates, instead of merely providing that the Commission might modify or revoke any order it might make, and it is also unreasonable to suppose that the power to make a schedule of rates would have been coupled, in effect, with the provision that no rate made by the carrier should ever be increased by the Commission. If the power to make a schedule of rates exists, it matters not how many changes may take place or how many new schedules may be made, the Commission must always refer to the rates of the carrier as they existed when it made its first schedule, and must never make any rate in excess of the rate for the same service which was then in existence, for of

course the power given to the Commission to revoke its order gives it no greater power than to restore the status which existed when it made its order. The statutes of other States relating to the powers of Railroad Commissions to make and change rates show that the power to make schedules of rates has usually been coupled with provisions regulating the procedure for changing the rates made by the Commission, and that the Commission has ordinarily been left free to increase as well as to reduce rates.

Mr. Hines further states:

The Kentucky Statutes, however, after providing for the reduction of a rate found to be extortionate provides that the Commission may revoke or modify its order, and, therefore, if the Commission has power to make a schedule of rates that provision applies as well to an order making such a schedule as it does to an order fixing a single rate, and the schedules made by the Commission may be changed by that body at any time without notice or hearing, and the new schedules put into effect at once. This would be such an extraordinary power to confer upon the Commission that the power to make a schedule of rates ought not to be, if it could be, implied. While the power to revoke or modify an order changing a single rate without notice or hearing is subject to abuse, the power to change an entire schedule of rates at any time without notice or hearing would be liable to much greater abuse, would prove an engine of oppression.

The power given to a Commission to make a schedule of rates to be effective, must always include the power to increase as well as to reduce rates, for in no other way can there be any elasticity in the schedule, and in no other way can inequalities be corrected, without rendering the schedule confiscatory as to the carrier, if the entire body of rates has already been reduced to a point at which it yields barely a fair return on the carrier's investment.

Not only does the McChord Act give the Commission no power to increase a rate made by the

carrier, but it gives the Commission no power to to say that the *carrier* shall *not* increase such rates, and that is another reason for supposing that the Legislature did not intend to give the Commission power to make a schedule of rates. It is hardly conceivable that the Legislature should have empowered the Commission to make a schedule of rates with the proviso that every rate in that schedule should be *less* than the corresponding rate of the carrier then in existence, and yet if the Act can be construed as conferring the power to make a schedule of rates, that power must be coupled with that proviso, for the only power given the Commission is to reduce a rate which it finds to be too high, and there is no suggestion of the power to anticipate the action of the carrier, and to say that existing rates made by the carrier shall not be increased. That being true, no rate in any schedule which the Commission might make could be made exactly the same as the carrier's existing rate, for that would be to say merely that the existing rate shall not be increased, which the Commission has no power to do. A provision for such an arbitrary schedule would alone probably render the Act void, but, if not, the Court cannot attribute such an unreasonable intention to the Legislature.

It being clear that it was not intended to give the Commission power to make a schedule of maximum rates, the only question that remains is whether or not the Commission is empowered to make an order reducing all rates of the carrier, or a large body of rates, without any pretense of the separate consideration of each rate. The power given to the Commission is to fix "a just and reasonable rate" in the event it finds that the carrier has been guilty of extortion after a hearing of the complaint, of the "nature" of which ten days' notice is required to be given. That a separate hearing as to each rate was contemplated seems clear and, while the Commission might have some discretion in the matter similar to the discretion which a court exercises in consolidating actions growing out of the same trans-

actions, it does not follow that the Commission has power to hear a general complaint that all rates are too high and to make a general order reducing rates without pretending to consider the rates separately. If the Commission had the power and were determined to make a general reduction of rates, any hearing it might give as to separate rates would probably be a matter of form, but the law requires that it shall go through that form. There are many forms which do not accomplish all that they were designed to accomplish, but they cannot be dispensed with for that reason, the theory of the law being that the observance of the form tends to secure the accomplishment of the end in view, and that the law will be enforced in its true spirit. As already suggested, the fact that the Commission was not given express power to make schedules of maximum rates indicates that the Legislature did not think that rates in general were too high, and that it was not intended that there should be a general reduction of rates. That being true, it was manifestly intended that all the circumstances and conditions affecting the reasonableness of the particular rate complained of should be considered in determining whether the rate is extortionate, and upon that question the evidence as to each rate must be different, the fact that the carrier is receiving in the aggregate more than a fair return upon its investment being a very small factor or none at all in determining that question.

Again he states:

> There are so many elements which enter into the determination of the reasonableness of every rate, and those elements vary so greatly that there is strong reason for the requirement that each rate be separately considered by the Commission.

The Commission in this case, however, did not make a general order reducing *all* rates, but it has attempted to make a schedule of rates, leaving some rates as fixed by the carrier, adding an order however, that those rates shall not be increased. There it nothing whatever in the McChord Act which can

by any possibility be construed as conferring power upon the Commission to look into the future and determine that if the carrier should, under changed conditions, increase a certain rate it would be guilty of extortion. The carrier is not empowered to make any order at all as to a rate until it has found that rate to be extortionate, and the only order it is then authorized to make is an order reducing the rate, no authority being given to order the carrier *not* to increase a rate. When a rate has been reduced it cannot be increased by the carrier, but that is by virtue of a provision of the Act itself and not by virtue of any order of the Commission. That the carrier should have the right to increase a rate which, for some cause which has since been removed, has been placed so low that it does not yield a fair return for the service, will hardly be questioned, and if it should increase a rate to such an extent that it should become extortionate it would then be time to make complaint and have the rate reduced.

The power of the Commission with respect to rates has already received judicial interpretation, after full argument of counsel for both parties, in the case of *Louisville & Nashville Railroad Co. v. McChord*, 103 *Fed.* 216, wherein the court stated at page 221:

> It will be observed that there is no general power delegated to the Commission to fix rates, nor does the statute creating the Commission give it any such right. * * * * If the law only conferred on the Commission power to fix a schedule of rates for all railroads in the State generally, it would be the duty of the court to await its action in that regard, and then premit those rates, if called in question, to stand or fall as they might, in the court's judgment, be just and reasonable, or the reverse. It might be conceded that, in case a railroad commission was given general power to establish a schedule of rates, a failure on the part of a carrier to conform to those rates when established might be made punishable. *Reagan v. Trust Co.*, 154 *U. S.* 362.

Again, the court in the same case, at page 224, states:

> As already indicated, the Act does not fix nor attempt to fix, nor require the fixing of, rates equally and generally for all. It aims alone at single instances.

This construction of the scope of the McChord Act has never been set aside or reversed, and ought to be upheld by this court as decisive and controlling, especially as it was, in this respect, acquiesced in for six years, without any attempt to exercise or claim, on the part of the Commission, that it possessed the power to prescribe and establish schedules of maximum rates for any or all the railroad companies in Kentucky on complaint or otherwise.

The language used by Congress in conferring upon the Interstate Commerce Commossion the power to make and fix an interstate rate or rates is found in Section 15 of the Act to regulate commerce as amended June 29, 1906, as follows:

> That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such

> case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction.

This language is very similar to that used by the Kentucky Legislature in the McChord Act to confer the power on the Commission to make and fix an intrastate rate or rates. The only substantial difference consists in the fact that the Interstate Commerce Commission is not granted the power to institute an inquiry on its own motion for the purpose of ascertaining whether an existing interstate rate is unjust or unreasonable, and if found so to be, determining and prescribing what will be a just and reasonable rate thereafter to be observed in such case as the maximum to be charged, but its rate-making power can only be exercised "after full hearing upon a complaint made as provided in Section thirteen of this Act," while in the McChord Act the Commission's power to make and fix a rate may be set in motion either when complaint shall be made to it accusing any railroad company of charging, collecting or receiving extortionate rates over its line or lines in Kentucky, or when said Commission shall receive information or have

reason to believe that such rate or rates are being charged, collected or received.

The proceeding before the Commission, however, which resulted in the order complained of was set on foot by complaint, and not by the Commission itself.

It is insisted that neither the Interstate Commerce Commission nor the Kentucky Railroad Commission has been granted the power to make and fix schedules of maximum rates. The former Commission has expressly decided, since the passage of the Hepburn Bill, it has no authority to establish general rate schedules. (*Corn Belt Meat Producers' Association v. C. B. & Q. Ry. Co.*, 14 *I. C. C. Rep.* 376).

IX.

THE ALLEGATIONS OF THE COMPLAINTS ON WHICH THE ORDER COMPLAINED OF HEREIN WAS MADE AND PROMULGATED BY SAID COMMISSION WERE INSUFFICIENT TO GIVE JURISDICTION TO OR AUTHORIZE SAID COMMISSION TO MAKE SAID ORDER OR TO PRESCRIBE AND ESTABLISH THE MAXIMUM RATES OR STANDARD TARIFF FOR ALL OF APPELLEE'S LINES, BETWEEN ALL STATIONS, FOR ALL DISTANCES, ON ALL CLASSES OF FREIGHT IN KENTUCKY, EVEN IF SAID ACT EMPOWERED SAID COMMISSION TO ESTABLISH AND PRESCRIBE SUCH MAXIMUM RATES OR TARIFFS UPON COMPLAINTS OF ANY CHARACTER OR UNDER ANY CIRCUMSTANCES.

A stipulation has been made and entered into between counsel for appellee and appellants, and filed in support of this ground of appellee's motion, showing copies of the complaints and pleadings filed before the Commission in the proceeding which resulted in the order promulgated July 20, 1906, and herein complained of, including copies of the motions and demurrers of appellee

in that proceeding, which the Commission overruled. (R. 158-164). Copies of the complaints, on which the Commission founded its said order, are made exhibits with the appellant's answer herein. (103, 114, 117, 122.)

It is insisted for appellee that, even had it been within the powers of the Commission to make and establish a schedule of maximum rates for observance by appellee upon all its lines, between all stations, for all distances, and an all classes of freight in Kentucky, the complaints filed before the Commission were insufficient to give it jurisdiction for that purpose. Those complaints, with the exception of that of the Norman Lumber Company and others, pertaining to particular rates on lumber (which were reduced by the Commission's order of December 7, 1905 [R. 137, 140], not complained of or involved in this suit), as will be seen by the Court, contained only allegations of the most general character. (R. 103, 114, 117, 122.) The rates complained of were not specified. Neither the stations between which they prevailed, nor the classes of freight carried thereunder, were named or identified in any way. Furthermore, with the exception referred to, the parties complaining in this indefinite way did not show by their complaints they had any interest whatever in the other rates upon all classes of freight reduced by the order of the Commission aforesaid or in the shipment of any freight belonging to any of the several classes of freight, between any of the points on appellee's lines, covered by the terms complained of herein. (*State v. Chicago, M. & St. P. Ry. Co.*, 86 *Iowa* 641, 53 *N. W.* 323.)

In Paragraph X of its bill appellee states (R. 17):

> That said McChord Act expressly provides that, when complaint shall be made to said Commission accusing any railroad company or corporation of charging, collecting or receiving any extortionate freight or passenger rates, said Commission "shall

give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer, or employe thereof, stating the time and place of the hearing of the same; also the nature of the complaint or the matter to be investigated." This provision of the statute was not complied with, and this complainant was not notified of the *nature* of the complaint, that is, the particular rate or rates complained of were not specified. In none of the complaints or amended complaints in said proceeding before said Commission was there any specific or definite statement as to what rate, or between what points, or on what line of road, or on what class of freight or what commodity, was complained of or intended to be attacked as extortionate, except in the complaint of said lumber companies.

In the same paragraph, and in the stipulation above mentioned, the character of the several motions and demurrers filed by the appellee is set forth. All of these were overruled before appellee's answer was filed before the Commission. So, it will be observed by the Court that appellee objected to the Commission's taking jurisdiction in said proceeding of the subject of maximum rates on its lines in Kentucky, between all stations, on all classes of freight, and did not concede it had power to establish a schedule of maximum freight rates, nor waive its objections to, or acquiesce in, its assumption of such power.

X.

SAID COMMISSION, WITHOUT ASSUMING TO FIND OR CONDEMN ANY OF APPELLEE'S RATES, EXCEPT THOSE SET FORTH IN ITS "TABLE A, LOCAL FREIGHT TARIFF," AS EXTORTIONATE, WHICH WAS A JURISDICTIONAL FACT OR CONDITION PRECEDENT, IN ANY EVENT, TO ITS EXERCISE OF POWER (IF ANY IT HAD AT ALL IN THAT RESPECT), TO MAKE OR FIX RATES, BY ITS SAID ORDER UNDERTOOK TO FORBID APPELLEE FROM CHARGING, COLLECTING, OR RECEIVING RATES IN EXCESS OF THOSE EMBRACED IN ANY OF ITS COMMODITY TARIFFS, WHICH WERE OR ARE LESS, FOR THE SAME DISTANCES, THAN THOSE SHOWN IN SAID COMMISSION'S "MAXIMUM RATES, KENTUCKY RAILROAD COMMISSION'S STANDARD TARIFF NO. 1, APPLICABLE TO THE LOUISVILLE & NASHVILLE RAILROAD," WHEREBY SAID COMMISSION ATTEMPTED TO PROHIBIT APPELLEE FROM INCREASING OR ADVANCING ANY RATE OR RATES IT HAD OR HAS IN FORCE AND EFFECT ON ANY COMMODITY OR COMMODITIES BELONGING TO EITHER OF THE CLASSES SET OUT IN COMMODITY OR COMMONDITIES BELONGING TO EITHER OF THE CLASSES SET OUT IN SAID SO-CALLED "STANDARD TARIFF NO. 1," NOTWITHSTANDING THE FACT THAT SUCH COMMODITY RATE OR RATES HAD NOT BEEN FOUND BY SAID COMMISSION TO BE EXTORTIONATE, AND THE FURTHER FACT THAT THEY WERE AND ARE LOWER FOR THE SAME DISTANCES THAN THE MAXIMUM CLASS RATES WHICH SAID COMMISSION BY ITS SAID ORDER PRESCRIBED AND PROMUIGATED AS REASONABLE.

It would seem that this ground is so well taken it needs no argument in its support. The order of the Commission, promulgated July 20, 1906, after prescribing and undertaking to establish a schedule of maximum

rates on the different classes of freight from 1 to 6, inclusive, and from A to N, inclusive, for the distances therein stated designated as " Maximum Rates, Kentucky Railroad Commission's Standard Tariff Number 1, Applicable to the Louisville & Nashville Railroad," further provides (R. 65):

> That where said defendant, the Louisville & Nashville Railroad Company, has in effect a tariff or tariffs of rates upon any commodity or commodities belonging to either of said classes, and for any of said distances, *less* than that shown in said Maximum Table of Rates * * *, said defendant shall not charge, collect or receive rates in *excess* of that shown by said tariff or tariffs (of said defendant).

Again, at the close of said order is found the following additional provision (R. 69):

> It appearing to the Commission from tariffs now on file in this office that many of the commodities assigned to the various classes stated in the Maximum Rates, Kentucky Railroad Commission's Standard Tariffs, Nos. 1 and 2, herein adopted, are transported by the respective railroads on commodity rates, or rates *less* than those fixed by said standard tariffs, it is now Ordered, That said commodity or such other rates as are *lower* than those fixed by said Railroad Commission's Standard Tariffs Numbers 1 and 2, shall *remain* in effect *as Maximum Rates* until otherwise ordered by this board.

Now, the McChord Act vests no power in the Commission to prohibit a railroad company from increasing or advancing an existing rate not held to be extortionate. In other words, the Commission's powers, by the terms of said Act, are limited to a case where, after notice and investigation, the carrier is convicted by it of extortion, and in such case only can it fix a rate, toll or

compensation which such carrier may charge, collect or receive for like services thereafter rendered.

As stated by Judge Evans in *Louisville & Nashville Railroad Co. v. McChord,* 103 *Fed.* 221, speaking of the Commission's powers:

> Its sole authority in the premises is stated in the Act above set forth, and must be based upon its conviction of the railroad of extortion. It cannot move until what we may call this jurisdictional fact has been ascertained to exist; and then, having proceeded to determine that the railroad has been guilty of extortion, although it has been furnished with no unmistakable statutory standard as to what is to be held to be extortion, it *lowers* the rate of that road *for that particular service.*

Finding one rate to be extortionate does not license the Commission to lower *all* rates for the same carrier, nor to hold fast and fixed all its other rates, and to enter an order preventing any increase or advance therein by the carrier at any time thereafter.

Appellee at the time of the making of the order complained of had (as admitted by the Commission, R. 69), and now has, a large number of commodity rates in force between different points on its lines in Kentucky, which were and are *lower* than the class rates on the same articles of freight for the same distances fixed in the Commission's schedule of maximum rates. These commodity rates have been fixed on account of competitive and other legitimate reasons, which were and are controlling. A large portion of the revenue from carrying freight in that State is derived from the rates on certain commodities, which have, for the time being, been taken out of the regular numbered and lettered classes, to which they would otherwise belong. Yet if the Commission's order is upheld as valid, the hands of appellee's Traffic Manager are tied, and he cannot,

in any contingency or for any reason, however strong or urgent in his judgment, put any such commodities back into their proper classes, or in any other manner increase or advance the rates thereon, or even bring them up to the rates prescribed by the Commission as just and reasonable for such classes, respectively, in its own schedule of maximum rates.

To illustrate the absurdity of the claim of the power in question on the part of the Commission: Suppose, upon a general complaint the Commission should find the whole body of appellee's existing rates, both class and commodity rates, for all distances, and between all stations in Kentucky, not extortionate or unreasonable, but, for fear its Traffic Manager might some day increase or advance some or all of them to a point deemed by him just and reasonable, the Commission should enter an order prohibiting him from hereafter making any such advance or increase. Would it be contended by any one that such an order was within the power of the Commission? Certainly not. But, if the Commission may, as to a very large part of appellee's existing rates, viz.: its commodity rates, lawfully make such an order, it may lawfully extend such an order to the entire body of appellee's existing rates, and yet, at the same time, not condemn any existing rate as extortionate or unreasonable.

The order prohibiting the carrier from increasing its commodity rates makes those rates as much a part of the Commission's Schedule of Maximum Rates as are those class rates specifically mentioned and set out therein. It must be assumed that each material part of this schedule system or body of intrastate freight rates is dependent upon every other material part thereof, and that each rate was fixed with reference to all other rates therein. The order of the Commission is legislative, and must be construed in the same manner

as an act of the Legislature prescribing a schedule of rates. Where the parts of a statute are so dependent, one upon the other, that it cannot reasonably be presumed that the one part would have been enacted without the other, then, if one part is invalid, the whole statute must fall. Applying this rule to the Commission's schedule of rates the whole schedule or scheme of rates must be declared void, even were it conceded that the Commission possessed the power to make and established a schedule of maximum rates at all. (*Illinois Central R. Co. v. McKendree*, 203 *U. S.* 514; *The Employers' Liability Act Cases*, 207 *U. S.* 463.)

The court has no power to substitute or enforce a system of rates for those prescribed by the Commission, nor can it presume the Commission would have fixed maximum *class* rates had it known it had no power, at the same time, to fix maximum *commodity* rates for appellee, or to prevent the existing commodity rates from being increased by appellee, which is the same thing.

In *Reagan v. Farmers' Loan & Trust Company*, 154 *U. S.* 362, it was said:

> The challenge in the case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not therefore within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of the quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

Treating the order of July 20, 1906, as having been made and intended by the Commission for the purpose of establishing a maximum freight tariff as a whole for appellee, that is to say, for all classes and all commodities of freight, between all stations and for all distances in Kentucky, it is void and unenforcible, not only because the Commission had no power to make a schedule of maximum rates at all, but certainly and beyond any question because of lack of power in the Commission to make and establish appellee's existing commodity rates as its maximum rates.

XI.

THE SAID ORDER SHOWS ON ITS FACE THAT THE MAXIMUM RATES THEREIN PRESCRIBED STYLED "KENTUCKY RAILROAD COMMISSION'S STANDARD TARIFF NO. 1" WERE ARBITRARILY MADE APPLICABLE TO THE LOUISVILLE & NASHVILLE RAILROAD CO., AND WERE NOT MADE APPLICABLE FOR THE SAME DISTANCES AND ON THE SAME CLASSES OF FREIGHT TO ALL THE OTHER RAILROAD COMPANIES OPERATING LINES IN KENTUCKY, AND ALTHOUGH WITHOUT STATUTORY POWER OR AUTHORITY TO CLASSIFY THE SAME RAILROAD COMPANIES IN KENTUCKY ON ANY BASIS WHATEVER FOR THE PURPOSE OF PRESCRIBING FREIGHT RATES TO BE CHARGED AND COLLECTED BY THEM, THE SAID COMMISSION, BY SAID ORDER, UNDERTOOK TO PRESCRIBE SUCH MAXIMUM FREIGHT RATES TO BE OBSERVED BY THE APPELLEE, WHILE OTHER RAILROAD COMPANIES OPERATING LINES IN KENTUCKY WERE AND ARE PERMITTED TO CHARGE AND COLLECT HIGHER RATES ON THE SAME CLASSES OF FREIGHT FOR THE SAME DISTANCES, OR SUCH FREIGHT RATES AS SUCH OTHER COMPANIES MAY DEEM REASONABLE, ALTHOUGH SAID OTHER COMPANIES WERE MADE DEFENDANTS TO AND PROCEEDED AGAINST UNDER THE SAME COMPLAINTS BEFORE SAID COMMISSION IN THE PROCEEDING WHICH CULMINATED IN THE MAKING OF SAID ORDER PROMULGATED JULY 20, 1906, AND THUS THE ATTEMPTED CLASSIFICATION BY SAID COMMISSION IN THIS RESPECT WAS NOT BASED UPON THE CHARACTER OR VALUE OF THE SERVICES RENDERED, AND SAID ORDER, THEREFORE, IS UNFAIR, DISCRIMINATING, AND AMOUNTS TO A DENIAL TO COMPLAINANT OF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The order complained of is on its face discriminatory. It classifies the railroad companies in Kentucky without assigning any reason therefor, or showing on what basis, if any, it was done. For some it prescribes maximum rates of one kind, for others of a different kind, and for still others none at all. The existence of differ-

ences between railroad companies alleged in the answer is denied by the replication. The issue of fact thus formed, in the absence of any evidence on that point in the record on this appeal or in the Commission's opinion or otherwise, when the burden of proof to explain or justify this apparently arbitrary and unjust classification was on appellants, was properly decided by the court below against appellants, in adjudging and decreeing that the Commission's order was null and void. If for no other reason, it is clearly void because it confessedly by its own terms denies to appellee the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment.

The proposition advanced by appellants in their brief (pp. 84-85) that what is a just and reasonable rate for one railroad might not be for another is not disputed. But appellee insists, if there were any differences between other railroads and its railroad in Kentucky, which would justify the Commission in placing the maximum of its freight rates on all of its 1300 miles, constructed in large part through mountainous country, lower than such other railroads, the facts and circumstances constituting the justification for this inequality of rates should have been both averred and proved by appellants, but they did neither, because, it must be assumed, they had no justification therefor. Whether appellee's lines in Kentucky were constructed and operated upon level ground or through mountains, in the 54 counties where they are located, or consist of main lines or branches, the maximum of its freight rates on every mile thereof was fixed by the Commission at the same. Appellants concede, in the concrete example they give (Brief, p. 85) appellee is justified in charging a higher *passenger* rate on certain named branches than it charges on its main line and other branches in Kentucky, yet they utterly fail to show by the opinion, in pur-

suance of which the order complained of was entered, why they have undertaken to limit the maximum of appellee's *freight* rates to the same standard for all distances, on its main line and all its branches in Kentucky, and have permitted other railroad companies which own and operate their main and branch lines in the same sections of that State to fix, charge and collect their own maximum freight rates. For aught that they may be discovered by an examination of this record the differences, which appellants in their answer allege exist, between the railroads in Kentucky, would justify and make just and reasonable *higher*, instead of *lower*, maximum freight rates on appellee's lines than on the lines of those railroad companies which were exempted from regulation by the Commision and for which no maximum freight rates have ever been fixed. The principles decided in the cases cited by appellants in their brief (pp. 82-100) are not controverted, but they furnish no support to the arbitrary action of the Commission herein complained of. On the contrary, many of them sustain the contention made by appellee on this branch of the case.

In the case of *Louisville & Nashville Railroad Co. v. McChord*, 103 *Fed.* 216, the Court (Judge Evans) held the McChord Act void:

> First, because any order made by the Comission thereunder fixing a rate is not uniform in its operation throughout the State, but applies to one company alone, and thus denies to such company the equal protection of the laws; * * * *

The statute is copied in full in the body of the opinion at page 218, and at page 219 he says:

> When the act is closely analyzed, it is found to provide: First, that either when complaint shall be made to the Railroad Commission accusing any railroad or corporation of charging, collecting or receiving extortionate freight or passenger rates

> over its line of railroad in this State, or when that Commission shall receive information or have reason to believe that such rates are being charged, collected or received, it shall be, second, its duty to "hear and determine" the matter as speedily as possible; * * * *

Further provisions of the statute as to procedure are then pointed out by Judge Evans, and at page 221 he says:

> It will be observed that there is no general power delegated to the Commission to fix rates, nor does the statute creating the Commission give it any such right. Its sole authority in the premises is stated in the act above set forth, and must be based upon its conviction of the railroad of extortion. It cannot move until what we may call this jurisdictional fact has been ascertained to exist; and then, having proceeded to determine that the railroad has been guilty of extortion, although it has been furnished with no unmistakable statutory standard as to what is to be held to be extortion, it lowers the rate of that road for that particular service.

After having further analyzed and discussed the statute, he states his conclusion that the statute is void, beginning with the last paragraph but one on page 223, as follows:

> First. If one railroad should be convicted by the Commission of having been "guilty of extortion," and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone, and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge as proper a rate which, if charged by the one thus convicted, would be deemed extortion; thus not merely inflicting a single penalty for a single offense, but placing

the guilty railroad at the disadvantage of having a lower rate than its rivals, and depriving it of the equal protection of the laws. It cannot be just, it cannot be an equality of right or of protection, for an act to be unlawful if done by one railroad in Kentucky, and perfectly lawful if done by another railroad in the same State.

At page 224 he further says:

> Third. The most prominent feature of this legislation is the manifest purpose, if possible, to regulate rates by severe punishments for single offenses, rather than by means of real attempts to solve the immense problem of fair and reasonable freight and passenger charges, by industrious and earnest efforts to ascertain what they should be. But, even if the spirit of the statute be extreme and harsh, rather than moderate and fair, this would be unavailing to the complainants, if the provisions of the act had been kept within constitutional bounds. As already indicated, the act does not fix nor attempt to fix nor require the fixing of rates equally and generally for all. It aims alone at single instances, and, as a condition precedent to the right of the Commission to make any change in any existing rate, it requires that the Commission shall find the railroad guilty of extortion, without defining in any precise sense what that is; * * * *

The opinion of Judge Evans in the case cited is directly in line with the later opinion of this Court in the *Raymond Case* to which reference has been made (207 U. S., 20). It is true that the judgment of Judge Evans was reversed in *McChord v. Louisville & N. R. R. Co.*, 183 *U. S.*, 483, but this was not because of any fault that the Supreme Court found with his reasoning in the respect under consideration, but because it was considered that his injunction order was premature. In other words, his judgment was reversed upon equitable grounds only, and in the last paragraph of its opinion (183 U. S., 502) the court expressly disclaimed any in-

tention of passing upon the question which the trial court had decided, Chief Justice Fuller saying:

> The result of these considerations is that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition *before the rates are fixed at all.* Whether *after* they are determined their enforcement can be restrained is a question not for decision on this record, and we are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication.

In *Dow v. Beidelman,* 125 *U. S.* 680, a *statute* fixing different rates for different railroads, reasonably classified, was sustained. This court at page 691 said:

> The Legislature in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature. *If the same rule is applied to all railroads of the same class,* there is no violation of the constitutional provisions securing to all the equal protection of the laws.

In *Cutting v. Kansas City Stock Yards Co.,* 183 *U. S.,* 79, the syllabus reads:

> The statute of Kansas of March 3, 1897, entitled "An Act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, *and regulating all charges thereof,* and removing restrictions in the trade of dead animals, and providing penalties for violations of

this act," is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company, and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws.

Three of the justices were of the further opinion that the Kansas statute deprived the Stock Yards Company of its property without due process of law. As to this the other six refrained from expressing any opinion, but upon the proposition laid down in the syllabus the entire nine justices concurred. Justice Harlan says, at page 114, speaking for the six to whom we have referred:

> We assent to the judgment of reversal—so far as the merits of this case are concerned—upon the ground that the statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws. Upon the question whether the statute is unconstitutional upon the further ground that, by its necessary operation, it will deprive that company of its property without due process of law, we deem it unnecessary to express an opinion.

All that part of the opinion of Justice Brewer from pages 102 to 112, inclusive, relating to the contention that the equal protection of the laws was denied, met with the approval of the entire court. What he said is too extended for quotation, but the drift of it all is illustrated by the quotation made at page 109, from *Cooley's Constitutional Limitations, 5th Ed.,* 484, 486, *and 7th Ed.,* 559, as follows:

> Every one has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow." This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

In *Yick Wo v. Hopkins*, 118 *U. S.* 356, this court at pages 373, 374 said:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in several cases that are cited.

In the case of *Interstate Commerce Commission v. Chicago Great Western Railway Co.*, 209 *U. S.* 108, Mr. Justice Brewer, speaking for the court at pages 119, 120, said:

> It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able

> to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers.

In *L. & N. R. R. Co. v. Railroad Commission of Tennessee,* 19 *Fed.* 679, the opinion holding the Tennessee statute under consideration to be unconstitutional, was delivered by Circuit Judge Baxter and concurred in by Judges Hammond and Key. The statute is set out in its entirety in that decision at pages 682, 687, inclusive, and the opinion is very full and instructive upon the question of the power of a Railroad Commission to discriminate. Keeping in mind the powers attempted to be exercised by the Kentucky Railroad Commission (and which in the case of the appellee the latter Commission has exercised) of fixing a rate for one company and fixing none for its competitor or competitors, so much of the opinion of Judge Baxter as bears on this point, at page 695, is quoted, as follows:

> Notwithstanding the act under consideration professes to regulate railroad operations, it, in effect, places the business of all railroad corporations in the state under defendant's supervision and control. In addition to the authority to revise their tariffs of charges, as hereinbefore shown, the commissioners may, for undisclosed reasons and without accountability to any one, give better rates to one corporation than to another.

So with respect to the provisions of the McChord Act, the Commission may "for undisclosed reasons" investigate the rates of one railroad company and not those of another, and thus "for undisclosed reasons" fix the rates for one company and not for another, provided

the construction placed on said Act by the Commission be correct.

Again, Judge Baxter, at page 696, states:

> Whenever, in their judgment,******"any change in rates" is desirable, * * * * * * the commissioners' shall give information in writing to the corporation * * * * * * These powers, in addition to the authority to prescribe rates, include all the incidents pertaining to the absolute ownership of property. In the exercise of them the commission can limit receipts and dictate expenditures, *insure prosperity to one company and drive another into bankruptcy* * * * *
>
> But the defendants say that their revisions of tariff rates and suggestions in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners, they do so at the peril of subjecting themselves to a multiplicity of suits by the state and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which, by force of the prima facie effect therein given to the ex parte action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or quasi criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. *The authors of this statute have been careful to place this beyond doubt.*

Further on this eminent Judge in the same case, at page 697, states:

> By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the

State to the public use, without that just compensation provided for by the constitution. In a word, the commission, under the terms of this act, hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands.

In *Raymond v. Chicago Union Traction Co.*, 207 *U. S.* 20, this court held:

> The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislative, executive or judicial authority, but relate to all instrumentalities through which the State acts.

As further illustrative of the protection guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, the court is referred to the opinion of Mr. Justice Strong in the case of *Ex parte Virginia*, 100 *U. S.* 339, 346, 347, and in reading this quotation the court is asked to keep in mind the thought of the powers and authority claimed for the Kentucky Railroad Commission. In that case Mr. Justice Strong, with respect to the provisions of the Fourteenth Amendment, forbidding the denial of the equal protection of the laws, said:

> They have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal

> protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.
>
> But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon persons who are the agents of the State in the denial of the rights which were intended to be secured.

In *Terre Haute & Indianapolis Railroad Co. v. State*, 159 *Ind.* 438, the court, speaking by Chief Justice Hadley, said, at pages 454, 455:

> It is the duty of the state to treat its citizens alike, and to see that others who exercise public powers do the same. So when the State should undertake to regulate the tariffs of its railroads, *it must make such tariffs uniform.* It could not require the people between Indianapolis and Terre Haute to pay one mileage rate, and the people between Indianapolis and Madison to pay another.

This Court in reversing that case (194 U. S. 579) did so, not because it found any fault with the doctrine above quoted, for the same had so often been repeated and approved by this court that it was no longer the subject of comment or criticism.

These decisions were rendered, in most cases, concerning the express provisions of State statutes, but, as before stated, neither by the express provisions of the McChord Act, nor by necessary implication therefrom can it be claimed that the Commission has any power to

classify the railroad companies operating lines within that State upon any basis whatever, or to make any distinction in the matter of prescribing rates for passengers or freight, even were it conceded that by said Act the Commission had the power to establish schedules of maximum rates.

Upon the grounds urged, supported by the authorities cited, it is respectfully submitted that the Court should affirm the decree appealed from.

HENRY L. STONE,

Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1908.

No. 522.

ADAM T. SILER, ET AL., - - - - - - - *Appellants,*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, - - *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEE.

This appeal is from a decree of the Circuit Court (Rec. p. 78) perpetuating a preliminary injunction (Rec. p. 36) granted September 24, 1906, which continued as an interlocutory injunction the restraining order (Rec. p. 34) made upon the bill of complaint filed by the railroad company against appellants (Rec. p. 1) to enjoin appellants from putting into effect a schedule of rates promulgated by appellants, acting as the Railroad Commission of Kentucky, to be employed by appellee and four other railroad companies in the transportation of freight between points in Kentucky, the order being entered June 20, 1906, to become effective July 19, 1906 (Rec. pp. 3, 13 to 33). Appellee's bill of complaint prayed (Rec. p. 12) that appellants be enjoined from putting into effect the schedule of rates aforesaid, from forbidding appellee to advance its commodity rates, and from causing appellee or its employes to be indicted or otherwise prosecuted at law for failing or refusing to charge the rates fixed by the schedules.

By amended bill of complaint (Rec. p. 49) filed Jan. 9, 1908 the original bill was extended to the new Commissioner who succeeded the retiring Commissioner, and certain mistakes of figures were corrected and the averments of the original bill amplified; and by amended bill (Rec. p. 61) filed July 10, 1908, discrimination between the railroad carriers operating in Kentucky is shown as a violation of the constitutional requirement of equal protection of the laws.

Appellants, November 5, 1906 (Rec. p. 37), filed answer to original bill, and March 18 and July 10, 1908, respectively, filed answers to amended bills (Rec. p. 57, 63), and December 3, 1906 (Rec. p. 44), March 18, 1908 (Rec. p. 60), and July 10, 1908 (Rec. p. 65), appellee filed replications to the respective answers of appellants, and on July 10, 1908 (Rec. p. 73), moved the court to instruct the Special Master theretofore appointed, February 27, 1907 (Rec. p. 45), to report that the order made by appellants as the Railroad Commission aforesaid, establishing the aforesaid tariff of rates was void upon the divers grounds specified in the order. Appellants, July 10, 1908 (Rec. p. 76), objected to appellee's said motion and moved to dismiss its bill of complaint, first, for want of equity, and, secondly, for want of sufficiency in grounds of said motion; and on the same day the court filed its opinion (Rec. p. 77) and entered its final decree (Rec. p. 78) sustaining appellee's motion and directing the Special Master accordingly; and the parties, complainant and defendant, stipulated that the Master would report as directed by the said order, and thereupon the cause was submitted for final decree, and the court being advised, adjudged and decreed that the preliminary injunction aforesaid be made perpetual, and appellants and their successors be enjoined from continuing the order aforesaid, from putting the said order of said Commission into force or effect, or enforcing or attempting to enforce the said order as applicable to appellee or to its lines in Ken-

tucky, from recommending or procuring indictments against it or its employes to recover the penalties prescribed in the statute under which appellants were assuming to proceed, and enjoined to revoke and cancel the order so far as it prescribed or attempted to prescribe for appellee the schedule of maximum of rates provided by said order; and from such decree appellants appealed.

The order aforesaid made by said Commission reduced appellee's class rates about 25%, and forbade appellee to advance any of its commodity rates or other rates which were lower than the class of rates of the classes to which said commodities properly belonged, the provision being (Rec. pp. 29, 30) that the Commission were of opinion that appellee's class rates were extortionate in so far as they were in excess of the rates fixed by the order of June 20 aforesaid, and accordingly, appellee was forbidden to charge rates in excess of those shown by the schedules promulgated by said order,

> "Provided, however, that where said defendant, Illinois Central Railroad Company has in effect a tariff, or tariffs, of rates upon any commodity or commodities belonging to either of said classes and for any of said distances, less than that shown in said maximum table of rates, herein designated 'maximum rates, Kentucky Railroad Commission's Standard Tariff Number 2, Applicable to the Illinois Central Railroad Company,' said defendant shall not charge, collect or receive rates in excess of those shown by said tariff or tariffs."

The statute under which appellants acted is Section 820A Ky. Stats., and is as follows:

> 1. "When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or

lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been, guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent, or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employe shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor

more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction, in any sum not less than two thousand dollars nor more than five thousand dollars.

2. "The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

3. "Prosecutions under this act shall be by indictment.

4. "All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

5. "In making said investigation, said Commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the Commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment."

The proceeding upon which appellants cited appellee and the various other railroad carriers to appear and defend all their rates charged for transportation between points in Kentucky was instituted by J. Ed. Guenther, a merchant of Owensboro, in 1905, complaining of certain rates made by the railroad carriers entering Owensboro, *to wit: Louisville & Nashville Railroad Company, Illinois Central Railroad Company and Louisville, Henderson &*

St. Louis Railway Company, and making no specific complaint of any other carriers or their rates; and on August 26, 1905 the complaint was amended and virtually all the rates of all the carriers operating in Kentucky on all classes of freight thereby charged to be excessive, discriminatory and extortionate; some of said rates excessive, some extortionate and all discriminative in favor of some local communities as against others; no specific complaint was made of any rate charged by any railroad carrier in the State except concerning the rates to and from Owensboro, and no explanation made by the complaint of the shippers of any interest which they or any of them had in any other rates, and no fact stated showing any rate charged by any railroad carrier in Kentucky to be extortionate, unjust or unfair to shippers.

The Norman Lumber Company filed a complaint of *rates on logs, ties and timber commodities*, and the Commonwealth was permitted by appellants to file an intervening complaint covering all the intrastate rates charged by all the carriers in Kentucky (Rec. pp. 5, 6, 67 to 73 inc.).

Shortly after the statute aforesaid took effect, some of the railroad carriers of Kentucky, including of those now before this court, the *Louisville & Nashville R. R. Co., and the Southern R'y Co. in Kentucky*, instituted in the U. S. Circuit Court at Louisville, Ky., a suit against the Railroad Commissioners to enjoin their proceeding under the said statute, because of its unconstitutionality, and an injunction was by said Circuit Court granted accordingly (103 Fed. R. 216); and upon appeal from said decree of injunction this court (183 U. S. 489) reversed the decree appealed from upon the ground (p. 502) that—

> "The result of these considerations is that the duty of enforcing its rates rests on the commission and that none of the consequences alleged to be

threatened can be set up as the basis of equity interposition before the rates are fixed at all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication.'

As appears from the language just quoted, the Commission had taken no action whatever under the statute when the injunction of the Circuit Court referred to was granted, but, as now appears above, the Commission on June 20, 1906 (Rec. p. 13, *et seq.*), promulgated an order reducing by 20 or 25% all the class rates of five of the railroad carriers of the State, and forbade them to advance any of their commodity or class rates which were less than the rates on classes to which such lower rates usually belonged, thereby establishing a complete schedule of all rates.

The "contentions of grave importance which were pressed in argument" upon this court in the case reported 183 U. S. 483, 502, appear in the opinion of the Circuit Court, 103 Fed. 216, and in the briefs filed in this court by the able counsel for appellees.

Condensed, those contentions are that the statute was invalid, because—

1. The rate making power of the Commission was by the statute based upon a judicial determination by a non-judicial body that the carrier had been guilty of extortion whereby it was forever deprived of the valuable right to make its rates for transportation.

2. The right thus taken from the carrier so convicted still remained with all other carriers, whereby the convicted carrier was deprived of the equal protection of the laws by the judicial decree of a non-judicial body.

3. The statute afforded no standard of the offense of which the carrier was to be condemned and for which it should be deprived of its rate-making power.

4. The statute afforded the carrier no opportunity to test the reasonableness of the rates fixed by the Commission, but imposed ruinous penalties upon the exercise of the carrier's right to seek judicial protection.

5. The act applied equally to interstate and intrastate rates, and amounted, therefore, to a regulation of interstate commerce.

6. Out of the unexpected shape taken by the proceedings of the Commission other questions arise, (a) whether or not the statute authorized the Commission to make an entire schedule of rates; and (b) whether or not the entire scheme, or schedule, of rates promulgated by the Commission is void because of that part thereof which forbids the carriers to advance their commodity rates or those class rates which are lower than the corresponding rates fixed by the Commission.

JURISDICTION.

The jurisdiction of the Circuit Court is based as well upon diverse citizenship of the parties as upon Federal questions, and that of this court upon the question of the conflict of the State statute and the order of the State Railroad Commission with the Federal Constitution. *Rec. 1, 77, 78.*

ARGUMENT.

We shall confine our argument to the discussion of the last three points above enumerated, and for discussion of the others ask leave to refer to the able opinion of *Evans, J.*, in the appendix (cited and with approval by

this court in *Ex parte Young, 209 U. S. 146*) and the elaborate brief of Henry L. Stone, Esq., counsel for *Louisville & Nashville Railroad Co.* in these cases.

I.

The statute is void, because imposing ruinous penalties for the carrier's failure to use the rate fixed by the Commission.

A grave infirmity in the statute now assailed is its attempt to prevent any judicial inquiry into the reasonableness of the rate to be prescribed by the Commission. This statute is one of the type condemned in *Ex parte Young,* 209 U. S. 123. In such statutes the legislatures have deliberately schemed to deprive the carrier of due process of law. They have tyrannically attempted to so frame their enactments as to deter the carrier by intimidation from raising even the question of their constitutionality, and to banish every opportunity of testing in court the validity of the enactments. Obviously if legislatures had the power to do what they have thus attempted, then they could nullify the Fourteenth Amendment to the Federal Constitution, for they could deprive the carriers of their property without due process of law without any danger of being prevented. Concerning such legislation this court, in *Ex parte Young* (209 U. S. 161), said:

> "The provision is somewhat unusual, but the reasons for its insertion in that act are not material, and neither require nor justify comment by this court.'

The material point, however, is that the provision in question was condemned by this court as all other such

provisions have been condemned when brought to a test of their constitutionality. *See Hunter* v. *Wood, 209 U. S. 205; Prentis* v. *Atlantic Coast Line Co., etc., 211 U. S. 210; Louisville & Nashville R. R. Co., etc.,* v. *Alabama R. R. Com., 157 Fed. R. 944.*

The Kentucky statute makes no provision whatever for any judicial review of the rates to be established by the Commission. It requires the Commission to fix a rate for the carrier to charge "for like services thereafter rendered," and provides that such rate shall be entered as an order of the Commission and copy thereof be mailed to an officer, agent or employe of the carrier affected thereby, "and shall be in force and effect at the expiration of ten days thereafter," and that "should such railroad company or corporation or any officer, agent or employe thereof collect or receive a greater or a higher rate" for like services thereafter rendered than that fixed by the Commission, the carrier, officer, agent or employe shall be deemed guilty of extortion, and on conviction fined as above recited. The subsequent provisions of the statute provided for no defense whatever, but simply for a trial of the fact of the carrier or its employe having charged a higher rate than that fixed by the Commission. Nothing could be plainer than the attempt of the Legislature to avoid in this statute any opportunity for the carrier to question the reasonableness of the rate to be fixed by the Commission; the offense defined consists simply in charging *a higher rate than that fixed by the Commission.* The rate fixed takes effect ten days thereafter, and when in force constitutes a law which, under the statute, can not be disregarded without incurring the penalties of the statute. Thus no alternative is left the carrier but to obey or to pay penalties which were intended to be so large and multiply so fast as to prevent the carrier's disobedience.

In this connection this court's language in *Ex parte Young* (209 U. S. 145) is in point:

> "For disobedience to the freight act the officers, directors, agents and employes of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony. * * * The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. * * * The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. * * * The result would be a denial of any hearing to the company. * * * 'Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?' (Cotting v. K. C. Stock Yards, 183 U. S. 79-100.)
>
> " 'It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the val-

idity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws' (quoting 183 U. S. 182) * * *

"If the law be such (said this court, 209 U. S. 147) as to make the decision of the Legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, &c., Railway Co. v. Minnesota, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

Rejecting the contention advanced concerning the right to disobey a statute at least once in order to test its validity, this court said, page 147:

"Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the Legislature is complete

in any event. In the case, however, of the establishment of certain rates without any hearing the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. * * * The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event."

This court's language just quoted is as applicable to the *instant case* as it was to *Ex parte Young*, for, as we have just shown, the Kentucky Legislature attached to the disobedience of the order of the Commission fixing the rate to be charged thereafter by a carrier the heavy, and increasing, penalties obviously designed to prevent the carrier's questioning the rate fixed by the Commission, a rate which the carrier had the right to test in the courts, and the question of whose reasonableness constituted, as had repeatedly been decided by this court, the proper subject of judicial review. *Chicago, etc., Co.* v. *Minnesota, 134 U. S. 418, 458; Reagan* v. *Farm, L. & T. Co., 154 U. S. 362, 397; Smyth* v. *Ames, 169 U. S. 466, 526, 527, etc.; Chicago, etc.,* v. *Tompkins, 176 U. S. 167, 173.*

In *Ex parte Wood, 155 Fed. R. 190*, the case out of which arose *Hunter* v. *Wood* (*see 209 U. S. 206*), the court, holding void the statute prescribing severe penalties as violating the rights of the railway company guaranteed by the Fourteenth Amendment, said, *pp. 191, 2:*

"The penalties prescribed by the State statute for charging more than the statutory rates are so enormous that, if permitted to be enforced, they would practically bankrupt the railroad in an exceedingly brief time, and before a final hearing could be had in the cause, and thus place the complainant in a position where it would be powerless to assert a right which is guaranteed to it by the Constitution of the United States. If the criminal prosecutions against the agents, conductors, and employes are permitted to continue, the managers of the railroads can not successfully operate their trains, carry the mails, or continue their usefulness as common carriers doing an interstate business."

It is unnecessary, however, to multiply authorities, for the questions now under discussion have often been, of late, before this court.

The case, therefore, now presented is the case of a carrier having the right to a judicial review of a rate fixed by the Commission, and alleged by the carrier to be confiscatory, being confronted with the *fiat* of the Legislature to install and employ the Commission's rate or pay the ever-increasing penalties. Since the decisions of this court in *Ex parte Young* and *Hunter* v. *Wood*, cited *supra*, discussion seems hardly any longer necessary to show that the provision of the statute prescribing the confiscatory penalties is void, and that either that provision, if it can be separated from the residue of the statute, must be condemned or, if it can not be so separated, the whole statute must suffer that fate.

If it be assumed that the enormity of the penalties prescribed by this act have the effect to nullify the provision for the penalties rather than the entire act, still the act itself is destroyed *in this case*, because the provision for the penalties is not separable from the main

provision of the statute, as was the provision for penalties in the Texas Act reviewed in *Reagan v. Farm, L. & T. Co., 154 U. S. 362, 365* and *395.*

In the Texas Act the Commission was empowered by *Section 3* to make all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs; to prevent discrimination, etc.; and by *Section 5* it was provided that in all actions *between private parties and such carriers* the rates and regulations prescribed by the Commission should be conclusive and accepted to be reasonable, fair and just, and not be controverted until found otherwise in a direct action brought for the purpose as prescribed in *Sections 6 and 7.*

Section 14 provided that the failure to adopt and use the rates prescribed by the Commission should constitute extortion and incur penalty not less than $100 nor more than $5,000; and *Section 15* imposed a penalty from $500 to $5,000 for unjust discrimination; and *Section 16* a penalty from $100 to $1,000 against the officers and agents of the carriers; and *other sections* imposed other penalties. Accordingly, this court said, *p. 395:*

> "We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions; and if the rates established by the Commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged—that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be in-

valid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the Legislature would not have enacted that which is within, independently of that beyond its power."

Again, *p. 396:*

> "The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the Legislature would not have established the commission and given it power over railroads without these independent matters."

It is observable that the Texas statute not only created the Commission, but gave it power to fix rates not only enforceable by penalty but to govern in private suits between shippers and the carriers, so that the enforcement of the statute, criminally by means of penalties, was a matter entirely independent of the other purposes of the statute, which were also independent and complete without the penalties.

The same is not true, however, of *Section 820-A, Ky. Statutes,* because, as said by this court, in *Louisville & Nashville R. R. Co.* v. *McChord, et al.* (*183 U. S. 499*), "the mischief to be cured" by *Section 820-A* was the want of certainty in *Section 816,* and in *Same* v. *Kentucky, 183 U. S. 505,* "the occasion of the passage of this act of March 10, 1900, was a decision of the Court of Appeals of Kentucky holding that Section 816 * * * could not be enforced as a penal statute for want of certainty." The statute under review, therefore, *Section 820-A,* is a *penal statute* passed to cure a defect in

another penal statute, *to-wit, Section 816,* and to make certain the uncertainty in said *Section 816* which rendered that section void as a *criminal statute.* It is evident, therefore, that the enforcement by penalties, in other words, the criminal provisions of *Section 820-A,* constituted the occasion of its enactment. *Reagan* v. *Trust Co., supra,* is, consequently, inapplicable, and the entire statute is void because of the nullity of its provisions concerning penalties. *Employers' Liability Cases, 207 U. S. 463, 501, etc.*

II.

The statute under review applies to both interstate and intrastate rates, and the order of the Commission and its accompanying schedule directly regulate all interstate rates controlling between points in Kentucky and points north of the Ohio and east of the Mississippi river; and such rates being a component and very important part of such order and schedule, the entire order and schedule are void.

a. The statute under review makes no distinction between interstate and intrastate rates over lines of railroad in Kentucky, but its language is broad enough to cover both; and the order and tariff made by the Commission confessedly affect all the interstate rates controlling between Kentucky points and points north of the Ohio and east of the Mississippi River. The act provides:

> "When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or

lines of railroad in this Commonwealth, it shall be the duty of said Commission to hear and determine the matter as speedily as possible."

In the language just quoted there is no limitation whatever to rates on purely *intrastate* freight, for that part of an interstate rate covering a "line or lines of railroad in this Commonwealth" satisfies the language of the statute as fully as does an *intrastate* rate over such line or lines. This court found a somewhat similar question in *Wabash, etc., R. Co.* v. *Illinois, 105 Ill. 236,* on writ of error from this court in *118 U. S. 557,* where the Illinois statute, like the Kentucky long and short haul constitutional and statutory provisions, forbade a railroad carrier to charge more for a short than for a long haul in the same direction, the distance of the former being included in the distance of the latter. The question in that case arose out of two shipments to New York, one from Peoria and the other from Gilman, Ill., the distance of the latter being included within that of the former, and 25 cents per 100 lbs. being charged for the shorter and 15 cents per 100 lbs. for the longer distance. The Illinois statute was condemned by this court, upon the ground that it applied to the interstate as well as intrastate shipment and, consequently, constituted an attempt to regulate commerce in violation of the Commerce Clause of the Federal Constitution. Concerning the Illinois statute this court said, *p. 564:*

"If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid."

Again this court said, *p. 565:*

> "It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction."

After elaborately reviewing the authorities this court said, *p. 575:*

> "We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

This court, accordingly, condemned the Illinois statute, because it assumed "to regulate the fares and charges by railroad companies within its limits for a transportation" which constituted "a part of commerce among the States."

The Kentucky statute, as aforesaid, is as vulnerable as was the Illinois statute, for its language *is as applicable to that part of an interstate transportation which is within the limits of the State* as was the Illinois statute, the language, as above quoted, being the "charging, collecting or receiving extortionate freight or passenger

rates over its line or lines of railroad in this Commonwealth."

Of course, had the highest State court of Kentucky construed this statute and interpolated into it such words as confined its operation to *intrastate* transportation exclusively, this court would, as it did in the Illinois case, follow the construction placed upon the statute by the State court; but if the *Kentucky court* followed the *Illinois court in construing the statute,* then this court would, as it did in the case just cited, follow the construction placed by the State court upon the statute and condemn the statute. In advance of a construction of the statute by the highest State court of Kentucky this court will not rewrite the statute of Kentucky in order to uphold its validity. *Employers' Liability cases, 207 U. S. 463, 501.*

b. Assuming the propriety, however, of so reforming the statute as to avoid its conflict with the Commerce Clause of the Federal Constitution, the order of the Railroad Commission and the tariff of rates thereby promulgated nevertheless infringe the Commerce Clause of the Federal Constitution by regulating interstate rates, for the order, upon its face, shows that the rates included in the tariff thereby promulgated covering transportation from the Ohio River gateways to interior Kentucky points *necessarily constitute a component part of all interstate rates controlling* between Kentucky points and points north of the Ohio and east of the Mississippi River, and it is improbable that the Commission would have promulgated its order had it realized that so prominent a part of it as consisted in such rates was invalid.

The Commission recites, at the outset, *Rec. p. 15,* that the reasonableness "of all rates for the transportation of all commodities upon all railroads to and from all points within the State" is raised, and doubtless the Commission meant thereby to refer solely to intrastate rates but the Commission also said, *Rec. p. 15:*

"Our investigation of the rate situation shows that all rates charged by the railroads in Trunk Line and Central Freight Association territory, which is that territory north of the Ohio and east of the Mississippi rivers, to and from points on the Ohio River are very much lower than are the rates south of the Ohio River. *Through rates are made to the Ohio River, but to points south of the Ohio River the full local rates are added to the through rates* (italics ours). We find that the principal portion of Kentucky is served by the Louisville & Nashville, the Illinois Central, the Southern Railway in Kentucky, the Cincinnati, New Orleans & Texas Pacific and the Chesapeake & Ohio Railway."

This court knows judicially that the Ohio River gateways are Cairo, Ill., Paducah, Ky., Evansville, Ind. (and Henderson, Ky.), Louisville, Ky., and Cincinnati, O., and that the Illinois Central R. R. extends southwardly from Cairo, Paducah, Henderson and Louisville; the Louisville & Nashville R. R. from Henderson, Louisville and Cincinnati; and the C., N. O. & T. P. R'y from Cincinnati, and other railroads of lesser importance from some of those points. It is, therefore, apparent that a very large part of the interstate traffic of the State of Kentucky, if not a majority of it, is carried upon interstate rates of which "the full local rates" assumed to be fixed by the Kentucky Railroad Commission must, if they prevail, form a constituent part.

The "full local rates" which "are added to the through rates" to form the interstate rate from a point north of the Ohio and east of the Mississippi River to a point in Kentucky south of that river are the *intrastate* rates which the Commission, by the order now assailed, have assumed to reduce or diminish. The Commission's order, therefore, not only directly, but necessarily re-

duces every interstate rate controlling between such interstate points. The order, consequently, directly regulates interstate commerce in defiance of the Commerce Clause of the Federal Constitution. Of course, the order does not profess to affect the interstate rate, but it nevertheless directly controls it. No carrier can transport upon a rate which is higher than the aggregate of the through rate from the northern point to the river and the local rate (Railroad Commission's rate) from the river to the interior Kentucky point. Therefore, to reduce either of the constituent elements of the interstate rate reduces the entire interstate rate. The proposition is self-evident. It is axiomatic. To subtract from one of the component parts is equivalent to subtraction from the whole.

Any shipment between the points supposed, if the interstate rate were higher than the sum of the locals, would be made to the Ohio River gateway and rebilled to the interior Kentucky point. This would result from the deliberate action of the Commission, as explained by the Commission in the language just quoted. Its action, therefore, as effectually regulates the interstate rate as did the action of the Kentucky Constitution and statute reviewed by this court in *Louisville & Nashville R. R. Co.* v. *Eubank, 184 U. S. 27,* where this court condemned the Kentucky legislation when so applied as to affect a shipment interstate from Nashville to Louisville, although it was earnestly insisted that the provision of the Kentucky legislation was aimed alone at the short haul transportation which was wholly between points in Kentucky. This court condemned the legislation, as applicable to the long and interstate haul, upon the ground that the interstate haul would be affected by the Kentucky legislation. The court said, *p. 35:*

> "The result of the construction of this provision by the court below is in effect to prohibit the car-

rier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the States in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the State, unless the consent of the Railroad Commission is obtained, because in either event the charge from Nashville to Louisville enters into and forms a part of the real subject-matter of the provision, the greater sum for the shorter distance within the State being compared with the lesser sum for the longer distance without the State; and the prohibition is absolute unless the consent of the Commission is obtained, from charging any more for the shorter distance within the State than for the longer distance partly within and partly without the State. And in this case, in order to maintain its State rate, it must fix its interstate rate at an amount which prohibits its doing interstate business.

"We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it or from a point within to a point with-

> out the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."

It is no answer to our contention to say that the order of the Railroad Commission does not in terms affect interstate commerce, and that the interstate carrier might charge with impunity the same rate after the Commission's order took effect as previously, because the situation recited by the Commission shows that the interstate carrier could not employ an interstate rate in excess of the sum of the locals. It has often been held that the great fundamental provisions of the Federal Constitution are not mere theoretical dialectics, but are practical provisions for the control of the affairs of real life, and this proposition is established in *Louisville & Nashville R. R. Co.* v. *Eubank,* just cited, for in that case it was insisted that the Constitution and statute of Kentucky *made no prohibition concerning the long haul, but only concerning the short haul,* and that, therefore, the legislation of Kentucky did not assume to regulate interstate commerce; but this court said, as above quoted, that the necessary effect, *i. e.*, the practical effect of the operation of the legislation, as construed by the Kentucky court, was to directly affect and, consequently, to regulate interstate commerce. This court pointed out, in its opinion, the practical effect upon interstate commerce of the Kentucky legislation, saying, among other things, *p. 40:*

> "Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this in-

terstate commerce, to lower its rates all through the State? If it be, is not the law which accomplishes this result a direct interference by the State with interstate commerce? And if it does not lower its State rates, and in consequence must raise its interstate rates in order to make its State rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect, by the State, of that commerce which ought to be free therefrom?"

Obviously, if Kentucky could regulate the rate from the Ohio River gateways south, Illinois, Indiana and Ohio could regulate the rates from those gateways north, and all interstate rates between points in Kentucky and points in the States named could be absolutely controlled by the concert of Kentucky and one of those States north of the river, except where the through rate were less than the sum of the locals. There seems no escape from this conclusion, and the necessary effect of the result is to regulate the interstate commerce between interior Kentucky points and interior points in the "Trunk Line and Central Freight Association Territory."

The question how far the Federal Government could go and how far the States could go in the regulation of commerce has been a difficult question since it was announced in *Gibbons* v. *Ogden* that there was a commerce wholly within the State not subject to congressional regulation, but the continual and relentless advance of commerce has developed a continual encroachment upon what had been once supposed the exclusive domain of State control, *e. g.*, the exposition of the Commerce Clause in *Gibbons* v. *Ogden* itself, and the development of the restrictive effect of the Fourteenth Amendment upon State power to regulate intrastate

rates as manifested in the progress evidenced by a comparison of *Munn* v. *Ill., 94 U. S. 113; C. B. & Q. R. R.* v. *Iowa, 94 U. S. 155; Peik* v. *N. W. R'y, 94 U. S. 164;* and *Stone* v. *Farm. L. & T. Co., 116 U. S. 307, with Wabash, etc., R'y Co.* v. *Ill., 118 U. S. 557.*

The situation does not show a usurpation by the Federal Government of State's rights, but simply an assertion of the rightful power of the Federal Government begotten by the necessity of the situation arising where the State had previously, by reason of inaction of the Federal Government, occupied ground properly belonging to Federal control. While, therefore, this court has asserted Federal dominion with the utmost caution, and confined its exposition of the Constitution to the necessities of the particular case presented, it has recognized and adjudicated Federal right as new conditions called for its exercise.

In *Wabash, etc., R'y Co.* v. *Ill.* (*118 U. S. 572*), this court declared:

> "It can not be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it that the commerce clause was intended to secure. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation or taxation or any other restrictive regulation interfering with and seriously embarrassing this commerce."

In *The Daniel Ball, 10 Wall. 557,* this court said, p. *564:*

> "There is undoubtedly an internal commerce which is subject to the control of the States."

Further said, however, *p. 565:*

> "It is said that if the position here be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market."

> "We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation."

Again, *p. 566:*

> "Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

Seeing, as above noted, that if Kentucky could regulate interstate rates between points in Kentucky and points in the States immediately north of the Ohio River (Trunk Line and Central Freight Association territory), Kentucky and one of those States could, by concert, regulate all the rates on interstate transportation between the points in those States, except such through rates as were

less than the sums of the locals, we submit that it is no answer to our attack upon the Kentucky Railroad Commission's order and schedule which directly affect the interstate rates in question, to say that the right of the States to make rates on intrastate transportation has always been recognized by this court, because this case, in the particular in question, presents an exceptional situation, as did *Louisville & Nashville R. R. Co.* v. *Eubank, supra,* as is above remarked. The right of State action was recognized in that case, but a restriction was declared thereon in so far as its direct result affected interstate commerce or interstate rates.

Concerning the question like that now presented in the instant case, this court, in *Ex parte Young, 209 U. S. 123, 145,* said:

> "Still another Federal question is urged, growing out of the assertion that the laws are, by their necessary effect an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not at any rate frivolous."

The order and tariff of the Railroad Commission being invalid as to all the rates from the Ohio River gateways to interior Kentucky points is invalid *in toto,* because it is obviously improbable that the Commission would have formulated those tariffs of class rates if they could be applicable to only so small a part of the entire transportation in Kentucky as would be left after eliminating the transportation from the Ohio River gateways. The doctrine of this court, therefore, in *U. S.* v. *Reese, 92 U. S. 214; Trade Mark Cases, 100 U. S. 82; Spraigue* v. *Thompson, 118 U. S. 19; Union Sewer Pipe Co.* v. *Connolly, 184 U. S. 540; James* v. *Bowman, 190 U. S. 127; U. S.* v. *JuToy, 198 U. S. 253; I. C. R. R. Co.* v. *Mc-*

Kendree, 203 U. S. 514; and Employers' Liability Cases, 207 U. S. 463-501, is controlling, and invalidates the entire order of the Commission.

III.

The Order of the Commission is void because unauthorized by the Statute.

1. The statute under review conferred upon the Commission no power to make a schedule of rates, but only the power to fix a rate in lieu of one adjudicated by the Commission to be extortionate. The power conferred and the power assumed by the Commission are radically dissimilar. The amount of a particular rate is important, or even vital, to a shipper and is all with which he has any concern, but it may be of little or no importance to the carrier, as it may slightly affect its total revenue, and such effect might even be neutralized by the proper advancement of some other rate. While, therefore, the question of the reasonableness of any rate should be considered as well with reference to the carrier's entire revenue as to the cost of the service representing the particular rate, the considerations involved in the determination of a particular rate are radically different from those involved in the consideration of a comprehensive schedule of rates; so when the Legislature empowers the Commission to fix a particular rate in lieu of a rate adjudged extortionate it does not confer the power to prescribe a comprehensive schedule of rates covering the entire traffic of the carrier in the State.

The machinery here prescribed by the Legislature is applicable solely to the consideration and adjustment of the particular rate and not a schedule of maximum rates, *e. g.*, the Commission is to act upon the complaint of

some shipper or upon some suggestion which impresses the Commission; it is to cite the carrier to appear in *ten* days, probably sufficient time to prepare to try the reasonableness of a particular rate, but insignificant for preparation to try the reasonableness of a schedule of all the rates in force in the Commonwealth; the trial of each rate is obviously expected to be special and an order entered in regard to the rate passed upon; and finally the carrier is to be indicted for charging a rate higher than that fixed by the Commission in lieu of the rate found to be extortionate, and an indictment is certainly not to cover all the rates in the State. Indeed, a bare perusal of the statute almost forbids debate upon the question whether it be applicable to the trial of particular rates or a comprehensive schedule of rates.

As aforesaid, the Legislature does not assume to authorize the Commission to enact a schedule of rates, but "to make and fix a just and reasonable rate, toll or compensation which said railroad company may charge, collect or receive for like services thereafter rendered," *i. e.*, after determining that the carrier has been guilty of extortion upon a hearing on not less than *ten days'* notice.

The "rate, toll or compensation so fixed" is to be entered as an order of the Commission, to be signed and to be effective ten days after being mailed to the carrier; and it may be revoked or modified by an order likewise entered of record. Obviously the machinery thus so carefully outlined is applicable to special trials of individual rates and not to wholesale legislation upon comprehensive schedules or tariffs of rates. The statute, too, contemplates action by the Commission only in case of complaint made to it or of the Commission's having "reason to believe that such (*i. e.*, extortionate) rate or rates are being charged," and the reference to the Commission's belief indicates that it is intended to be applicable to the same rate to which complaint by a shipper is made applicable

for the procedure provided for investigation of the rate is made the same in both cases; and it is inconceivable that the Legislature intended the Commission, either in case of complaint or of its own suspicion of extortion, to enter upon a trial of all the carrier's rates in force in the State or contemplated that complaint would be made of all such rates at once or that the Commission would have reason to believe that all such rates were extortionate. Indeed, the Commission does not assume to have acted upon their own initiative, but upon the complaint of Guenther and others, for they declare:

> "The several complaints, which for convenience, have been consolidated and heard together in this investigation, raise for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon all railroads to and from all points within the State."

The action of the Commission is, therefore, professedly upon "the several complaints" before them, and we see that there were but the complaint of Guenther *et. al.* and that of the Commonwealth, and the statute shows that the Commonwealth had no standing whatever before the Commission, and the complaint of Guenther *et. al.* was a fraud upon its face, for their original complaint was of only the rates into and out of Owensboro, and their amended complaint complaining of all the rates in the State showed, and could show, no interest which the complainants had or could have in all such rates. The complaint of Guenther and others was as preposterous as would be a complaint made to the Interstate Commerce Commission by a merchant in Florida, Texas, Washington or Maine of all the railroad rates in force in the United States. The Kentucky statute, under which the Commission proceeded, is remarkably like Sections 13,

14 and 15 of the Interstate Commerce Act as amended, and the power of the Interstate Commerce Commission is as ample as that of the Kentucky Commission, and if under the Kentucky statute the Kentucky Commission's order now assailed were authorized, the Interstate Commerce Commission could make a similar order regulating all the railroad rates in the United States upon a complaint of an insignificant merchant in some remote region of the United States who assumed to complain of all the rates in force in the United States, or upon an impulse emanating from the inner consciousness of the Commissioners. The Interstate Commerce Commission has no such power (see *e. g.*, late case of *M., T. & K. R. Co.* v. *I. C. Com.*, 164 Fed. R. 645, 649); its existence has always been disclaimed, and this court has declared, in terms most emphatic and perspicuous concerning the power to make rates at all, that:

> "The grant of such power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication." *I. C. Com.* v. *C., N. O. & T. P. R'y. Co., 167 U. S. 479, 495.*

Again, this court said, concerning the claim of the rate making power in the Commission, *p. 511:*

> "As it (Congress) did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal

to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just."

These weighty reasons, announced by this court, for the conclusion that power was not given by implication to the Interstate Commerce Commission to make rates apply, *a fortiori*, to the power which the Kentucky Commission now seek to raise by implication from the express authority to consider and determine the reasonableness of a particular rate and establish another rate in lieu thereof.

Again, this court in *Northern Securities Co.* v. *U. S., 193 U. S. 343*, when considering the vice of combinations among stockholders, said:

> "Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent."

The provision in the Kentucky Act for the Commission's fixing a rate complained of, or when it has "reason to believe that such (extortionate) rate or rates are being charged" obviously confers no more extensive power upon the Commission when acting from its own impulse than when acting upon complaint, for the machinery provided is the same for both cases, and, as above suggested, it were preposterous to suppose that the carrier could come prepared to defend all its rates upon *ten days'*

notice, or that it should have the same notice when called upon to defend all its rates as when summoned to justify the single rate of which complaint had been made; and the same considerations are applicable to the ten days provision for putting the Commission's rate into effect.

The considerations, too, for fixing a single rate and for fixing a comprehensive schedule are, as aforesaid, radically different. To make a schedule of rates there must be authority to compare rates and *raise some and lower others.* To avoid discrimination it may be so necessary to lower a rate that other rates *must be advanced,* especially where long and short haul clauses of statutes are in force, as in Kentucky. The Kentucky Statute, however, gives no power to the Commission to *advance* any rate, nor any power whatever concerning any rate except to *lower it,* because while it speaks of fixing a rate, it only permits such action in lieu of a rate found extortionate. The implication that the rate fixed must be lower than the rate found extortionate is irresistible. Under a power, therefore, to reduce a rate found extortionate it is impossible to imply the right to properly make a comprehensive schedule of rates. It was, consequently, not surprising that, as announced by the Commission, the complaints filed raised "for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon all railroads to and from all points within the State," but the wonder is that any shipper was ever found who had the hardihood to assume to raise such questions "for the first time."

The complaining shipper made complaint as well of discrimination as of extortion (*Rec. 5, 6*) and of offense against public policy, but the statute gave the Commission no right to correct discrimination and, as aforesaid, no right to advance any rate if too low, but the only authority conferred upon the Commission was to reduce a rate found extortionate.

Another insuperable objection to the claim of the Commission's authority to make a schedule is that it has *no right to affect a rate at all which is not extortionate;* consequently if a carrier have a comprehensive schedule of rates and but a few of them are extortionate the Commission can not make a schedule covering all the carrier's rates because the carrier would thereby be deprived of its right to advance its rates if occasion required, a right thoroughly established; see *in re Proposed Advances Freight Rates, Prouty, C.*

The omission of the Legislature to clothe the Commission with any power except to lower a rate is fatal to the claim of the right to make a comprehensive schedule of rates, for not only is the power to advance rates in order to insure uniformity and prevent discrimination between localities essential to a complete scheme of rate making, but the power to prescribe all the rates in the schedule is, *of course,* essential to the power to make a schedule, and the Commission has not even the power to order the carrier to maintain a rate already in force, for, as above indicated, it has only the power to operate at all upon the rate which is extortionate. As the Commission has, therefore, no authority to raise a rate, nor any authority to make any order at all concerning a rate not found to be extortionate, its authority would be limited to only a fraction of a carrier's rates, and the carrier would be at liberty to raise to any proper amount any rate not previously found by the Commission to be extortionate.

The power to make a schedule is not inferable from the power to make a rate in substitution for another rate found extortionate, the power of the Commission being strictly construed. *I. C. C.* v. *C., N. O. & T. P. R'y Co., 167 U. S. 479, 494, 505, 509, supra; R. R. Com.* v. *O. R. & N. Co., 2 L. R. A. 195, 199; Brymer* v. *Butler Water Co., 179 Pa. St. 231, 36 L. R. A. 260, etc.*

In *R. R. Com.* v. *O. R. & N. Co., supra,* a shipper demanded a return of an overcharge, and the jurisdiction of the Commission to award it was denied, its jurisdiction being confined to examination into the affairs of railroad carriers, requiring reports, with suggestions "as to what changes in the classification of freight or what changes in the rates of freights or fares" were "advisable for the public welfare."

Answering the inquiry as to the Board's jurisdiction the court said (*2 L. R. A. 198*):

> "The answer to that question can not be left to speculation. The jurisdiction of such commissions is not given by implication."

As to the claim of jurisdiction arising by certain implication the court said, p. 199:

> "Under this view the Board would be the most important tribunal in the State. * * *
>
> "It has for a very long time been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the Legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act."

In *Brymer* v. *Water Co., supra,* the Water Company had been furnishing impure water, and when the mischief was corrected the court, having visitorial powers, found that the Company was entitled to charge rents again, but declined to approve the Company's schedule. Instead thereof the court prepared another schedule, and its power so to do was the question at issue. The court held that the authority of the court of visitation was limited to condemning the rate fixed by the Company,

and did not extend to fixing a rate except to the extent that such determination was involved in indicating the limit to which the Company's rate should be reduced. The court said, *36 L. R. A. 262:*

> "We do not think this supervisory power would justify the court in preparing a tariff of water rents, and commanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property and the business of a solvent corporation from its owners to a court of equity, for no other reason than that the court regarded some one or more of the charges made by the company as too high. The act of 1874 contemplates no such radical departure from established rules as this, but provides simply for the protection of the citizen from extortionate charges, specifically pointed out and complained of by petition."

To concede the Commission's right to make a schedule of rates, even if the Commission adopted the carrier's rates except where found extortionate, would deprive the carrier of this undoubted right to advance its rates when too low, for the statute imposes enormous penalties upon the carrier and upon its officers, agents and employes for charging a higher rate than the rate fixed by the Commission.

In *Willcox* v. *Consol. Gas Co.* (*Dec. January 4, 1909*) this court remarked the difference in the considerations involved in fixing a complete schedule of rates and fixing a particular rate, saying:

> "So long as the total is enough to furnish such return, it is not important that, with relation to some customers, the price is not enough. Minneapolis &

St. L. R. Co. v. Minnesota, 186 U. S. 257; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1."

A conclusive demonstration that the statute conferred no power upon the Commission to make a complete schedule of rates is furnished by the decision of this court in *McChord* v. *R. R. Co., 183 U. S. 483, 499,* and *Louisville & Nashville R. R. Co.* v. *Kentucky, Ibid. 503-505,* where this court, in the first case, said:

> (P. 499.) "The mischief to be cured in respect of extortion as defined by Section 816 was the want of certainty, and the remedy provided was the fixing of the rates by the Railroad Commission."

And in the latter case said:

> "The occasion of the passage of this Act of March 10, 1900, was a decision of the Court of Appeals of Kentucky holding that Section 816, which declared that any railroad company which should charge and collect more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in that State, was guilty of extortion, could not be enforced as a penal statute for want of certainty. *Louisville & Nashville Railroad* v. *Commonwealth, 99 Ky. 132.*"

Section 816 (*183 U. S. 489*) defines extortion to be charging, etc., more than a just and reasonable rate; and the penalty for such is a fine assessed upon first, another upon second, and still another upon third conviction, so that it is demonstrated that the new statute, which, as has been determined by this court, was passed to cure the uncertainty in the old statute simply extends

to particular rates found to be extortionate, and does not provide for a comprehensive schedule of rates.

The delegation to a Commission of the rate-making power is strictly construed.

> Railroad Commission v. Oregon, R. & N. Co., 2 L. R. A. 195, 199.
> I. C. Com. v. C., N. O. & T. P. R'y Co., 167 U. S. 479, etc.

A point peculiar to States having constitutions like Kentucky's arises out of *Section 59, Ky. Constitution*, providing:

> "The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: * * *
> *Sub-sec. 29.* "In all other cases where a general law can be made applicable, no special law shall be enacted."

From this provision it results that if the statute under review gave authority to the Commission to prescribe schedules of rates the action of the Commission prescribing such a schedule for the Illinois Central R. R. Co. and a different schedule for the other railroad carriers affected by the order, and making no provision at all as to divers other railroad carriers in the State, would amount to special legislation on a subject where a general law could be made applicable, as is demonstrated by reference to divers statutes of other States fixing railroad rates. Rate making is, as often held by this court, legislative in character, and enacting a comprehensive schedule of rates is extensive legislation, and if the Legislature is required by *Section 59* of the Kentucky Constitution to limit its action to general laws

where a general law can be made to apply, certainly the Commission has no power to enact special legislation forbidden by the Constitution to the Legislature itself.

That a general law can be made to apply to rate regulation appears from a reference to the laws of divers States which have made such laws, notably the recent laws of Alabama, Georgia and Virginia.

2. Our last point, if found in our favor by this court, is conclusive of an affirmance of the decree below; but whether so found or not the schedule prescribed is void for an independent reason, viz., that the Commission have included in their order more than authorized by statute to include, and the tariff, or schedule, prescribed by the order is an entirety and indivisible.

As we have just demonstrated, the authority of the Commission was limited to action upon a rate found to be extortionate, and to a reduction of that rate, but the Commission, in assuming the power to make an entire schedule, has not only acted upon rates which it assumed to determine to be extortionate, but upon all other rates of the carrier, including those class rates found not to be extortionate, and to be even less than the rate subsequently prescribed by the Commission, and upon the commodity rates, all of which were likewise so found.

Indeed, the order itself indicates that the Commission gave consideration, apparently exclusively, to the rates of the Louisville & Nashville R. R. Co. (*Rec. 17 to 25*, inclusive), and that it used Louisville & Nashville rates, as formulated by the Commission in Tariff No. 1 (*Rec. 28*) as a yard stick to measure Illinois Central rates (*Rec. 30*).

Assuming, however, for the sake of this argument, that the Commission examined each rate separately, it appears by the table (*Rec. 31*) that the rates of the carrier (figures in red) were already as low as or lower than the rates fixed by the Commission in its order of

June 20, 1906, on the lower classes for 210, 220, 230, 240, 250, 275 and 300 miles, so that these rates and the carrier's commodity rates (*Rec. 33*) were as low as or lower than the rates promulgated by the Commission in its said order. These rates, therefore, were not extortionate and adjudication of extortion was a condition precedent to the Commission's jurisdiction to act, so that the Commission's order above quoted forbidding appellee to advance its commodity rates and certain class rates (*Rec. 32, 33*), although not found to be extortionate, is null and void, and beyond the jurisdiction of the Commission. This does not seem to be a debatable proposition in view of the language of the statute.

The ascertainment that the order and the accompanying schedule are void in part resolves the order void *in toto*. The Commission did not act, as authorized by the statute, in determining the reasonableness of a single rate, or of separate rates, but preferred to promulgate an entire schedule or tariff covering all the carrier's rates for the State, in other words (*Rec. 15*), "all rates for the transportation of all commodities upon all railroads to and from all points within the State."

A carrier might safely charge its "commodity rates," fixed in accordance with its other rates while charging such other rates, but be unable to afford to charge its commodity rates if its other rates were materially reduced *because the aggregate might not yield a reasonable return upon the carrier's capital invested.* It can not, therefore, be assumed that the Commission would have reduced the carrier's class rates so far as they were reduced *had it known that it could not prevent the advancement of the carrier's commodity rates and those class rates not reduced.*

Again, commodity rates, as the court judicially knows, are special rates fixed upon specified commodities or upon some commodities for particular distances or under

peculiar conditions, *e. g.*, rates upon coal where there is heavy river competition, or upon tobacco or other commodities which, by reason of market price, would not bear any but low rates; it would, therefore, be highly improbable that the Commission would be willing to reduce the ordinary class rates, which might be of comparatively little importance to the articles covered by them, if the Commission realized that in order to raise its necessary revenue the carrier would be *compelled and be at liberty to raise its commodity rates upon commodities that could so much less afford higher rates.* The rates upon commodities obviously, as the court will see, touch shippers and consumers in most vital parts, and the Commission might rather refrain from indirectly causing an advance of those rates than reduce class rates covering general merchandise, or such articles where the amount of the rate would be of far less importance. Accordingly the Commission in this case in adjudging a reduction of appellee's class rates provided, in connection therewith (*Rec. 32*), that appellee should not "charge, collect or receive rates in excess of those shown by said tariff or tariffs," being the commodity tariffs referred to. Also *Rec. 33.*

> "That said commodity or such other rates as are lower than those fixed by said Railroad Commission's Standard Tariffs Numbers 1 and 2, shall remain in effect as maximum rates until otherwise ordered by this board."

Thus the Commission attempted to prevent the natural consequence of the reduction of appellee's class rates, *viz.*, the advance of the commodity rates to supply at least part of the lost revenue, by forbidding the advance of such rates. The carrier could with propriety advance its commodity rates, being lower than the rates

prescribed by the Commission, and those class rates which were lower than the Commission's rates, and had the Commission known that the carrier was at liberty, and could not be forbidden, to advance those rates which had not been found extortionate, it appears highly improbable that the Commission would have made the order now under examination. The order assailed, therefore, *like any other legislative act* being void in part, and in a part not separable from the residue, is void in *toto*. U. S. v. Reese, 92 U. S. 214; Trade Mark Cases, 100 U. S. 82; Spraigue v. Thompson, 118 U. S. 19; Union Sewer Pipe Co. v. Connolly, 184 U. S. 540; James v. Bowman, 190 U. S. 127; U. S. v. JuToy, 198 U. S. 253; I. C. v. McKendree, 203 U. S. 514; Employers' Liability Cases, 207 U. S. 463.

CONCLUSION.

For the reasons above advanced, and those given in the opinion in the appendix and in the briefs of our colleagues, we respectfully submit that the decree of the Circuit Court ought to be affirmed.

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APPENDIX.

Louisville & N. R. R. Co. v. McChord, *et al.*, Louisville, H. & St. L. R'y Co. v. Same, Chesapeake & O. R'y Co. v. Same, Southern R'y Co. v. Same, (*103 Fed. R. 216*).

(Circuit Court, District of Kentucky, July 16, 1900, Evans, District Judge.)

These actions have for a common object the prevention of the threatened enforcement of an act of the General Assembly of this State which became a law on the 10th day of March, 1900, and, if constitutional, became effective ninety days thereafter. Including its title, the act is as follows: (Here follows the statute verbatim as quoted in the statement in this brief.)

The complainants severally seek the order of this court enjoining and restraining the defendants, who compose the Railroad Commission of the State, from carrying into effect any of the provisions of the act, upon the ground that it violates the Constitution of the United States—First, in authorizing the Commission to fix rates in certain instances upon interstate commerce; second, in authorizing the Commission to deprive them of their property without due process of law; third, in authorizing the Commission to take from them the equal protection of the law; fourth, in authorizing the Commission to take their property for public use without just compensation; fifth, in authorizing all of these things to be done by a body of executive officers who are not a court, and who are without judicial powers; and, sixth, as to the Louisville & Nashville Railroad Company, by authorizing the defendants to fix rates different from those established by the unrepealable charter provisions of that company, thereby impairing the obligations of its contract with the State of Kentucky.

When the act is closely analyzed, it is found to provide: first, that either when complaint shall be made to the Railroad Commission accusing any railroad or corporation of charging, collecting, or receiving extortionate freight or passenger rates over its line of railroad in this State, or when that Commission shall receive information or have reason to believe that such rates are being charged, collected, or received it shall be, second, its duty to "hear and determine" the matter as speedily as possible; third, the company complained of shall be given not less than ten days' notice by letter, mailed to an officer or employe of such company, stating the nature of the complaint or matter to be investigated, and the time and place of hearing it; fourth, the Commission shall hear such statements, arguments, or evidence offered by the parties as the Commission may deem relevant, and may take the depositions of witnesses; fifth, should the Commission determine that the company is or has been guilty of extortion, it shall fix a just and reasonable rate of toll or compensation which said

company may charge, collect or receive for like services thereafter rendered; sixth, the rate so fixed shall be entered in its order book and a copy mailed to an officer, agent, or employe of the railroad company affected thereby, and after ten days thereafter shall be in full force until changed by the Commission on the record; seventh, should any such railroad, its officer, agent, or employe thereafter charge, collect, or receive a greater rate of compensation for like services than those thus fixed for it by the Commission, such railroad, its agent or employe, shall be guilty of extortion, and shall be fined as provided in the act; and, eighth, of the offense of extortion as thus defined, the various circuit courts of the State shall have jurisdiction by indictment.

The Supreme Court of the United States in many cases has announced certain fundamental principles which have a more or less direct bearing upon the questions involved in these cases. In Chicago, M. & St. P. R'y Co. v. Minnesota, 134 U. S. 458, 14 Sup. Ct. 467, 33 L. Ed. 981, the court used this language:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States, and in so far as it thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In Reagan v. Trust Co., 154 U. S. 399, 14 Sup. Ct. 1055, 38 L. Ed. 1024, Mr. Justice Brewer, speaking for the court, said:

> "These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation.

> The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or for the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

In Railway Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, it was held that, when a state legislature establishes a tariff of railroad rates so unreasonable as to practically destroy the value of the property of the company engaged in the carrying business, courts of the United States may treat it as a judicial question, and hold such legislation to be in conflict with the constitution of the United States, as depriving the company of its property without due process of law, and as depriving it of the equal protection of the law. In the case of Turnpike Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, it was held that the courts have the power to inquire whether a body of rates prescribed by a legislature is unjust and unreasonable, and such as to work a practical destruction of rights of property, and, if found so to be, to restrain its operation, because such legislation is not due process of law. In Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, after an elaborate review of all the authorities, the court held, as it had done frequently before, that a railroad corporation is a person, within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. In that case the court also held that a state enactment, or regulations made under the authoriy of a state enactment, establishing rates for the transportation of persons or property by a railroad, that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution of the United States. The court held further that, while rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, can not be so conclusively determined by the legislature

of a state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. The court also held further that the idea that any legislature, state or federal, can conclusively determine for the people or for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of all our institutions, as the duty rests upon all courts, state or federal, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. And Mr. Justice Harlan, in delivering the opinion of the court in that case, at page 528, 169 U. S., page 427, 18 Sup. Ct., and page 842, 42 L. Ed., said:

> "The perpetuity of our institutions, and the liberty which is enjoyed under them, depend in no small degree upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The courts of the United States have not hesitated, and, in order to preserve to all persons, corporations, and individuals, alike, the guaranties of the constitution against invalid legislation, whether state or national, should not hesitate, to enforce the supreme law of the land. If in these cases the legislature or the railroad commission had established any rate, by or through the act complained of, the reasonableness and justness of that rate would be the legitimate subject of judicial inquiry, under the decision referred to; but no rates have in fact been fixed, and none are authorized to be fixed, except pursuant to the express provision of the act itself, nor until the commission has, after trial, "determined" that the railroad company has been "guilty of extortion." It will be observed that there is no general power delegated to the commission to fix rates, nor does the statute creating the commission give it any such right. Its sole authority in the premises is stated in the act above set forth, and must be based upon its conviction of the railroad of extortion. It can not move until what we may call this jurisdictional fact has been ascertained to exist; and then, having proceeded to determine that the railroad has been guilty of extortion, although it has been furnished with no unmistakable statutory standard as to what is to be held to be extortion, it lowers the rate of that road for that particular service. Its own opinion—its own judgment—is the sole guide upon both questions. If the law only conferred on the commission power to fix a schedule of rates for all railroads in the state generally, it would be the duty of the court to await its action in that regard, and then permit those rates, if called in question, to stand or fall as they might, in the court's judgment, be just and reasonable, or the reverse. It might be conceded that, in case a railroad commission was given

general power to establish a schedule of rates, a failure on the part of a carrier to conform to those rates when established might be made punishable. Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1055, 38 L. Ed. 1024. But this does not yet reach the cases before us. Here the power given is to be exercised only where the commission has "determined" that the railroad company has been "guilty of extortion" in a given instance or instances complained of, and then apparently only by way of punishment therefor, or as an occasion for laying a foundation for other punishment, although the legislature has established no definite test (unless in the Louisville & Nashville Railroad case) of what is an extortionate rate, and no positive guidance in the case of any of the complainants, unless it be that company whose charges are fixed at the maximum rates stated in its bill. It is frankly and altogether properly conceded upon all hands that the railroad commission is not constitutionally a judicial body, and can not, under the constitution or laws of Kentucky, rightly exercise judicial functions. Section 27 of the present constitution of the state provides that the powers of the government shall be divided into three separate departments, and each of them be confined to a separate body of magistracy, *namely*, the legislative, the executive, and the judicial; and section 28 provides that no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others. Under section 109 to 144, inclusive, the judicial department of the state government is established, and no judicial tribunals, except those named therein can lawfully be established in Kentucky. A railroad commission is not one of these. The supreme court of the United States in many cases holds that a railroad commission is a mere administrative body, and part only of the executive department of the government. Our analysis of the act in question, however, has clearly shown that the whole apparent purpose of the act was to give the commission the judicial power, or at least the *quasi* judicial power, to "hear and determine" whether a railroad has been "guilty of extortion," and as a result to lower the freight rate of that railroad for similar services. The commission could act only upon complaint made to it, unless in the presumably rare instances when information should otherwise come to it. The complaint must show what is loosely called a charging of an "extortionate" freight rate. The company complained of must be notified. This, it is true, must be given, not personally, but only through the mails; and the notice may be sent to a mere employe, who may be the most insignificant laborer, and one who cares nothing for the interests of his employer. But there must be, at the least, this sort of notice through the mails. At the hearing of the complaint evidence which the commission may adjudge to be "relevant" may be heard. Arguments may be submitted, and depositions may be taken and read. When the commission has "determined" that the company is "guilty of extortion," it shall then

fix the rate thereafter to be charged in similar cases by that company only, and not by carriers generally. This shall be entered upon the records of the commission. Afterwards, if the company thus found "guilty of extortion" shall in a like case charge or collect a rate greater than the one thus fixed, or if any of the employes shall do so, it shall be guilty of the crime of extortion. These matters all bear the marks of a judicial proceeding, and the fixing of a lower rate has all the appearance of inflicting that much punishment upon the party found "guilty of extortion" by this non-judicial body. But the act goes further, and provides that if, after the rate is thus fixed—after this possible punishment is thus inflicted—that company charges a higher rate for similar services, however reasonable it in fact might be in the judgment of a court, the real judicial tribunals of the state are then given the power to punish it or its employes therefor, though the power is apparently withheld from those courts of judicially inquiring whether the rate thus fixed under these circumstances by the Commission was just or reasonable, or whether in the case of the Louisville & Nashville Company it exceeded the rate it is expressly authorized to charge by its charter.

It will be seen, too, that the act might literally apply equally and indiscriminately to domestic and to interstate traffic alike, although as to the latter it can not be pretended that the legislature could give the commission any power whatever. That the commission can not, upon any complaint or information, lawfully base any action upon charges of freight rates upon interstate commerce, is too clear for argument; but as that may be true, and the commission still has power to fix rates upon local freight, the question yet remains as to the respective rights of the complaints and the commission in respect to domestic commerce. In a line of cases like Baldwin v. Franks, 120 U. S. 686, 7 Sup. Ct. 656, 763, 32 L. Ed. 766, the rule is established that where the language of a statute is so broad as to cover cases which are beyond the constitutional limits of legislative power, as well as those which are not, the courts will not attempt to separate them, but will hold the entire statute to be void, and it is insisted that this principle should be applied at this point to these cases. It is, however, conceived that, while the rule must apply to congressional enactments, there may be a difference where state laws are involved where there is a degree of necessity for confining the language used to state concerns,—the presumption being that the legislature, even by the use of language apparently the most general, does not intend to exceed its jurisdiction (End. Interp. St. Section 169); but, without deciding the point, and assuming, as is probably fair, that the Legislature only meant the act in question to refer to changes of freight rates on local commerce, it still seems to the court that it is subject to several objections which can not be overcome:

First. If one railroad should be convicted by the commis-

sion of having been "guilty of extortion," and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone, and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge, as proper, a rate which, if charged by the one thus convicted, would be deemed extortion; thus not merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its rivals, and depriving it of the equal protection of the laws. It can not be just, it can not be an equality of right or of protection, for an act to be unlawful if done by one railroad in Kentucky, and perfectly lawful if done by another railroad in the same state.

Second. The investigation of a complaint, and the decision thereon by the commission that the railroad complained of is "guilty of extortion," being the only way to put the act in motion, the railroad is entitled to first have a judicial determination of the question of its guilt, before the rate can be lowered as a penalty for the act charged to have been committed. The commission can not judicially, nor by due process of law, determine the one question upon which its right to fix a lower rate must depend. This is emphasized by the absence of any precise statutory standard by which the commission is to be guided as to what is an extortionate charge. The railroads have the inherent right to charge and collect a just and reasonable rate. Nothing short of a judicial proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping-stone to ulterior penalties of great severity, which it is the obvious purpose of the act to have inflicted. The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense, and lower its rates, alone as the penalty of such conviction.

Third. The most prominent feature of this legislation is the manifest purpose, if possible, to regulate rates by severe punishments for single offenses, rather than by means of real attempts to solve the immense problems of fair and reasonable freight and passenger charges, by industrious and earnest efforts to ascertain what they should be. But, even if the spirit of the statute be extreme and harsh, rather than moderate and fair, this would be unavailing to the complainants, if the provisions of the act had been kept within constitutional bounds. As already indicated, the act does not fix nor attempt to fix, nor require the fixing of, rates equally and generally for all. It aims alone at single instances, and, as a condition precedent to the right of the commission to make any change in any existing rate, it requires that the commission shall find the railroad guilty of extortion, without defining in any precise sense what that is. Of the

hearing upon the charge before the non-judicial administrative body, a species of notice and an opportunity to be heard as to the reasonableness and justness of the rates is given. But all that is thus done is preliminary to having a justification for the further step, if the railroad charges an excess rate over that thus fixed, of having it convicted of another and further extortion, without any provision in the act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just. No opportunity for such an investigation is afforded by the statute when the courts are given jurisdiction of the cases, and it is by no means certain that those courts would feel constrained to give the relief in the absence of an express statutory requirement. These considerations, therefore, seem to bring this case within the principle first above quoted from the opinion of the supreme court in the Minnesota case. If it had been the intention of the legislature to recognize the right to a judicial investigation of the reasonableness of the rates fixed under the provisions of the act, and to afford an opportunity therefor before a conviction upon an indictment for extortion, it would have said so in unmistakable terms, in order that the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case without a commissioner or adequate equipment to enforce it. It is indeed manifest from the entire scope and plan of the enactment, and its operation upon mere isolated cases only, that it was the purpose to exclude all inquiry upon that subject after the commission had acted, and to enforce by rigorous and extravagant penalties the rates thus fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the supreme court, this purpose thus plainly written in the legislation must be fatal to its validity. It is fair to say generally that a railroad should take the penal consequences of charging unlawful rates, but until the customary rates fixed by itself are lawfully and constitutionally changed by the state, or through its agencies, the carrier should not be punished for collecting its own. It may illustrate the subject to inquire whether punishments ought to await a final determination of what are just and reasonable rates, or whether their infliction should begin at once, with the possibility or probability of being entirely unconstitutional. Justice obviously dictates the former course, particularly as the latter might turn out to be utter spoliation. Viewing the act as a whole, and considering the only modes by which it can be put into operation, the court is of opinion that those modes are not due process of law, and that its enforcement would deprive the railroad company of the constitutional guaranty of its rights secured by the fourteenth amendment.

Fourth. And it may be that the principles announced by the court of appeals in Louisville & N. R. Co. v. Com., 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, by which Section 816 of the Kentucky Statutes, which made it an offense for a carrier to charge more than a "just and reasonable rate," was held to be void for uncertainty, would apply in this connection, particularly as the act before us is supposed to attempt to supply what that decision held to be lacking. It seems to the court that, viewed in the light of the suggestions already made, the act in question is quite subject to some of the criticisms made upon section 816.

Fifth. As applying especially to the Louisville & Nashville Railroad Company, the court is further of opinion that the act can not be maintained, because, without attempting directly, and probably not at all, to repeal the provisions of the charter of that company as to maximum rates, it still leaves it within the power of the commission to make it a crime for that railroad to charge the rates which its charter expressly authorizes. Again, it is not to be inferred that, even if the charter of this company can be amended, it was done by implication by the act before us. And still again, as the charter of that company was passed before 1856, when the general law was first enacted, reserving to the State the power thereafter to amend all charters of corporations, it probably can not be changed at all without its consent, which it is not pretended has been given. But, whether so or not, it can only be done, if at all, by language which is plain and unmistakable, and not merely by so doubtful an implication as is presented here.

Sixth. As to the case of the Chesapeake & Ohio Company: This court has jurisdiction of that action, also, by reason of the diverse citizenship of the parties to it, and, in the absence of any construction of the act by the court of appeals of Kentucky, must construe it for itself; and the court is of the opinion that the act violates the constitution of the state, in attempting to confer upon the commission what are judicial powers and functions, to-wit, the power, after complaint and notice given, to "herein determine" that the railroad has been "guilty of extortion," and, as a consequence, after that finding, to further decide that the freight rate of that road for similar services shall be a lower figure. These steps, as they apply only to individual instances, and are not a method of fixing rates generally, constitute the very essence of a judicial proceeding and judgment. Indeed, this ground of relief may possibly broaden out so as, *per se*, to aid all the others.

The court is always reluctant to interfere with the exercise by any state officer of his official functions, but in the most eminent degree, the safety of the property and the rights of the citizens of the community depend upon the supremacy of the constitution. The value of these safeguards is not diminished because individuals associate as a body corporate. They are

citizens, none the less, and the court must not shrink in clear cases from discharging its plain duty to uphold the dominant authority. If, as before intimated, the act in question only empowered the commission to fix rates generally, and for all alike, which would be a mere administrative work, the court would not interfere until that power had been exercised, and the propriety of the result called in question; but here not only may a rate in a single instance be fixed by a process plainly unconstitutional, but the most serious, not to say excessive, punitive consequences may be visited, not only upon the railroad, but also upon the individual citizen whom it may employ. If any citizen or employe were in the meantime fined and imprisoned for non-payment of the fines, he might be quite beyond adequate remedy, even if thereafter the question as to this legislation should be judicially and finally determined in accordance with the views we have expressed. Who, for example, is to compensate him for the confinement in jail? Pending this litigation the fining and imprisonment may go on by means of judicial processes entirely beyond the reach of this court if an injunction *pendente lite* is, at the threshold, refused. This court can not, except in bankruptcy matters, enjoin a proceeding in a state court. While in a criminal case under the act it might by careful practice be possible to get to the supreme court of the United States, the effort would be most tedious and expensive, and there might be a great multiplicity of cases growing out of numerous separate changes of rates. It seems, therefore, better, pending a final adjudication of these most important questions, to prevent the possibility of irreparable injury to any one by an adequate order. An injunction *pendente lite* is granted in each case.

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1908.

No. 523

ADAM T. SILER, ETC. - - - - - - Appellant,

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY - - - - - - Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEE.

ALEXANDER POPE HUMPHREY,
Attorney for Southern Railway Company in Kentucky.

P. C. NUNNEMACHER PRESS, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 523.

ADAM T. SILER, ETC., - - - - - - *Appellants,*

v. BRIEF FOR APPELLEE.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT.

This is one of four cases which are heard together. A full brief discussing all the questions which arise in this case, as well as certain questions peculiar to the case of the Louisville & Nashville Railroad Company, has been filed by counsel for that company. The statement contained in that brief, as well as that contained in the brief for the appellant, will enable us to omit a good deal of matter which we would otherwise be compelled to include. It is the purpose of this brief to present the argument only on certain subordinate questions arising upon the record, leaving the consideration of the constitutional questions to the other briefs on file.

The Southern Railway Company in Kentucky (which will be called the Southern Railway Company) is a cor-

poration of the State of Kentucky, owning and operating a line of road in that State from Louisville to Harrodsburg and from Lawrenceburg, an intermediate station, to Lexington, the total mileage being 138.

The bill of complaint, after alleging the incorporation of the complainant and describing its road, states the organization of the Kentucky Railroad Commission and the law under which that Commission made the order which is complained of. The bill describes the circumstances under which this order was made applicable to the complainant, the Southern Railway Company. In a subsequent part of this brief this matter will have to be stated with more detail. The bill then shows what revenue the Southern Railway Company has derived from its operation, gross and net—dividing the same between interstate and intrastate traffic; and shows that the net revenue on the scale of rates as applied by the complainant prior to any reduction made in the tariff by the order of the Railroad Commission produced a net revenue of only 1.83 per cent. of the proper proportion of the cost of reproducing its property applicable to intrastate freight. The bill alleges that any reduction is, therefore, in its nature, confiscatory and violative of the Fourteenth Amendment.

The bill then sets forth the complainant's claim that the statute under which the Commissioners purported to act is unconstitutional, infringing both the State and Federal Constitutions. This claim is the same as that made by the other railroads concerned in this litigation. As we do not argue this branch of the case, it need not be enlarged upon.

The complaint then alleges that the order made by the Commission was not one which it was entitled to make even if the statute under which it was acting should be held constitutional, and even though the rates as fixed by

the Commission were not confiscatory. This matter is the one that will be especially dealt with in this argument.

On the filing of the bill a restraining order was granted and afterwards a temporary injunction. Issues were made by appropriate pleadings and certain amended bills were filed upon which issues were also made. The case was referred to a commissioner to take proof. After a considerable amount of evidence had been taken before the commissioner it occurred to counsel on both sides that there were certain questions of law which should be settled in advance of the completion of the proof, and which, if decided in favor of the complainant, would render unnecessary any report from the commissioner or the taking of any further proof. The bill claimed that the act under which the Railroad Commission made its order was unconstitutional. Of course if this were true, then it mattered not whether the rates fixed by the commission were or were not confiscatory. Again, the bill alleged, as stated above, that even if the Railroad Commission was properly constituted and given power to make rates under any circumstances, yet the commission had proceeded in a way not in conformity to but violative of its warrant of authority. If this were true, then again there was no occasion for a final determination either as to the constitutionality of the statute or the confiscatory nature of the rates.

Accordingly, motions were made before the court to direct the commissioner to file a report to the effect that the order of the Railroad Commission complained of was void. This motion was sustained, and thereupon a final decree was entered making the injunction permanent, and from this decree an appeal is now prosecuted.

We will now endeavor to state, as concisely as possible, what are our reasons for thinking that the decree of the court below should be affirmed without passing upon the constitutional questions raised on the record.

JURISDICTION.

We are met at the threshold by a claim on the part of the appellants that the court below was without jurisdiction of this controversy. It is difficult to understand exactly what is meant by this. The bill alleged that the defendants were claiming to act under a statute passed in violation of the Fourteenth Amendment of the Constitution of the United States. The bill further alleged that what the Commission had done under that act (assuming it to be valid) amounted to a taking of the property of the complainant without compensation. Upon either of these grounds the jurisdiction of the Circuit Court could be maintained, In the one case the act of the State in passing the law was challenged; in the other case the conduct of the officials of the State, acting under a law of the State, was challenged as violative of the Constitution of the United States.

It is hardly necessary to cite authority for the proposition that upon either of these grounds the Circuit Court had jurisdiction, even though the complainant and the defendants were of the same citizenship. The right of a corporation to go into the Federal Court and challenge legislation of this kind has been so fully considered in the late case of Prentis, etc., v. Atl. Coast Line, 211 U. S. 210, that it is unnecessary to cite further authority. Again, there is a late case from this Court—Raymond v. Chicago Traction Co., 207 U. S. 20—which shows that where officers of the State exercise their power in a way which violates the Constitution of the United States, such acts can be enjoined as being the acts of the State.

It would seem to us further that there is no doubt of the proposition that this court can determine, and, indeed, will prefer to determine, the case without considering the question of the constitutionality of the State statute if

there are other sufficient reasons for affirming the judgment.

As this case comes to the court under an appeal provided for by Section 5 of the Act of March 3, 1891, being a case in which the constitutionality of a law of a State is drawn in question by reason of its conflict with the Constitution of the United States, this court acquires jurisdiction of the entire case and of all questions involved in it, and not merely the constitutional question. This is pointed out in the analogous case of Horner v. United States, 143 U. S. 576. But the case which seems to be entirely illustrative of the one at bar is that of Santa Clara County v. Southern Pacific R. R. Co., 118 U. S. 394. In that case there was a suit by a county in California against a railroad for taxes alleged to have been assessed against it. The case was removed from the State court to the Federal court. The defendant railroad company set up in its answer various defenses: first, that the act under which the assessment was made was violative of the Fourteenth Amendment to the Constitution of the United States; second, that the assessment was not made in accordance with the act. Mr. Justice Field, before whom the case came at the circuit, delivered an elaborate opinion, holding that the act under which the assessment was made was unconstitutional. This court passed by that question as not necessary to a decision, but affirmed the judgment upon the ground that, assuming the act to be constitutional, the assessment had not followed the act and was void.

We therefore pass to the consideration of questions which are not of special Federal cognizance.

THE ORDER OF THE COMMISSION WAS VOID, BECAUSE THE COMMISSION HAD NO RIGHT TO MAKE A SCHEDULE OF RATES.

The act under which the Commission acted provides:

> "When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the corporation or company complained of not less than ten days' notice by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same and also the nature of the complaint or matter to be investigated, and shall hear such argument or evidence offered by the parties as the Commission may deem relevant; and should the Commission determine that the company or corporation is or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered."

It appears without contradiction that in the early part of the year 1905 certain merchants living and doing business in Owensboro, Kentucky, made a complaint before

the Railroad Commission, complaining of certain rates made by the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and the Louisville, Henderson & St. Louis Railway Company. No complaint was made in regard to any rate of the Southern Railway Company, and, in fact, Owensboro is not on the line of railway of the Southern Railway Company nor, at the nearest point, less than 114 miles therefrom.

On August 26, 1905, these persons presented to the Railroad Commission an amended complaint, to which they made parties substantially all the railroads in Kentucky, including the Southern Railway Company, and in which they made this general allegation:

> "The complainants aver and charge that all local freight rates from and to all local points in the State of Kentucky, as fixed and charged by the defendant railroads, on all classes of freight, are excessive, discriminatory and extortionate."

The prayer of that complaint was as follows:

> "Wherefore your complainants pray this Honorable Commission not only to revise the local freight rates in and out of the city of Owensboro, but to revise and adjust the rates between all local points, from and to every local point throughout the entire State of Kentucky, and on final hearing they pray for all relief to which they are entitled, both at law and in equity."

Further, on September 14, 1905, the Louisville Veneer Mills and several others united in a petition to be made parties to the proceeding instituted as above. In this petition it was alleged that the petitioners were residents of the State of Kentucky and engaged in shipping lumber,

logs, ties and all timber commodities from point to point in the State of Kentucky over the railroads owned, controlled and operated by the defendants in the State of Kentucky. This petition contained the following allegation:

> "Petitioners aver and charge that all local freight rates from and to all points in the State of Kentucky, on all commodities as fixed and charged by the defendant railways, are excessive and extortionate, and that the freight classifications are discriminatory and extortionate. Petitioners aver and charge that the rates and classifications on lumber, logs, ties and all timber commodities to and from all points in Kentucky are especially extortionate, discriminatory and unreasonable."

On October 14, 1905, the Commonwealth of Kentucky undertook to file an intervening petition, in which, without complaining of any special rates, it made the same general complaint as to all rates to and from every local station and upon every railroad in Kentucky.

The Southern Railway Company, by motion and demurrer and, indeed, in every imaginable way, made objection to this proceeding. On the petition of the Louisville Veneer Mills a certain order was entered, fixing the rates on logs and certain varieties of lumber. This order was obeyed by the Southern Railway Company and is not a matter of complaint here. The Railroad Commission, however, proceeded upon the general allegations above stated, and, at the conclusion of the case, made a scale of maximum rates to be charged by the Louisville & Nashville Railroad Company. The Commission ordered that the Southern Railway Company should be governed as to its rates by this same schedule. It was, however, provided as to the Louisville & Nashville Railroad Com-

pany and the Southern Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Company (the three railroads required to conform their rates to the schedule made for the Louisville & Nashville Railroad Company) that in case any of them had in force at the time the order was made any rate lower than the rate fixed in this schedule, such rate should continue, and that the railroad company should not raise that rate, even up to the amount at which it was fixed by the schedule of maximum rates adopted as above.

There is no decision of the Court of Appeals of Kentucky on the question as to whether the Railroad Commission has, under this statute, the right to make a schedule of maximum rates. The question, therefore, comes to this court as one uninfluenced by any construction by the State of one of its own statutes.

We do not claim that the complaint made to the Railroad Commission must be confined to one rate. Thus one shipper might well be interested in several rates; for instance, in this case the Louisville Veneer Mills and others who joined in that petition are interested in rates on logs, ties and lumber. We submit that it would be competent to point out that the rate on each of these articles was extortionate. But it would seem clear to us that the purpose of the statute was to allow a complaint by some one interested, or to have the Commission make an investigation where some one had called its attention to the fixing by the railroad company of some rate or rates which were extortionate, and in which rate or rates the complaining person had an interest.

In the case at bar the Commission did not base its order upon any motion that it had itself instituted the investigation. Thus the opinion of the Commission opens:

> "Several complaints which, for convenience, have been consolidated and heard together in this investi-

gation raise for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon the railroads to and from all points within the State."

In the brief filed by counsel for the Louisville & Nashville Railroad Company all the authorities we have been able to find are collected, with the exception of one case, which seems to us to be much in point.

In Brymer v. Butler Water Company, 179 Pa. St. 231, S. C., 36 L. R. A. 260, the question arose whether a court could fix a schedule of rates to be charged by a water company under a statute which allowed a buyer of water to complain of the unreasonableness of a rate charged to him. The court said:

"The power of the court to interfere between the seller and the buyer of water is conferred only by the provisions already quoted from the act of 1874, and that act authorizes the court to entertain the complaint of the buyer, to investigate the reasonableness of the price charged, and to 'dismiss the complaint, or to order that the charges complained of, if found to be unreasonable and unjust,' shall be decreased. The water company prepares its schedule of prices in the first instance, and makes its own terms with its customers; but if these are oppressive, so that, in the exercise of the visitorial power of the State, the just protection of the citizen requires that they be reduced, then the court is authorized to say: 'This charge is oppressive. You must decrease it. You are entitled to charge a price that will yield a fair compensation to you, but you must not be extortionate.' This is not an authority to manage the affairs of the company, but to restrain illegal and oppressive conduct on its part in its

dealings with the public. It may be that the power to order that any particular item of charge shall 'be decreased' includes the power to fix the extent of the reduction that must be made, or to name the maximum charge for the particular service in controversy, which the court will approve, but the decree is that the item shall 'be decreased' either generally or to a sum named. The schedule of charges must be revised accordingly by the company defendant, and such revision may be compelled in the same manner that the decree of the same court may be enforced in other cases. We do not think this supervisory power would justify the court in preparing a tariff of water rents, and commanding a corporation to furnish water to the public at the rates so fixed. This would involve a transfer of the management of the property and the business of a solvent corporation from its owners to a court of equity for no other reason that that the court regarded some one or more of the charges made by the company as too high. The Act of 1874 contemplates no such radical departure from established rules as this, but provides simply for the protection of the citizens from extortionate charges, specifically pointed out and complained of by petition."

We respectfully submit that everything that is said in this case applies to the case at bar. Here was a complaint by certain merchants at Owensboro, Kentucky. This complaint alleged that certain rates charged by the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and the Louisville, Henderson & St. Louis Railway Company were extortionate. By an amended petition every railroad in the State of Kentucky was brought in and, among others, the Southern Railway Company. None of these merchants had any

relation whatever with the Southern Railway Company, and yet they alleged that every rate of that company in effect was extortionate. The Louisville Veneer Mills filed an intervening petition alleging that certain rates in which it was interested were extortionate, and then made the same general allegation that had been made by the Owensboro people. There was an adjustment of the particular rates complained of by the Owensboro people and of the particular rates complained of by the Louisville Veneer Mills, but on these general allegations the Railroad Commission undertook, as stated, to fix a schedule of maximum rates applicable to the Southern Railway Company.

What relation could the Owensboro shippers possibly have, or what relation could the Louisville Veneer Mills and others possibly have to the local rates on the Southern Railway Company between, say Shelbyville and Lawrenceburg, or Lawrenceburg and Harrodsburg, or Versailles and Georgetown? Yet all these rates are brought within the dragnet of this investigation, and every rate which is higher than the rates fixed for the Louisville & Nashville Railroad Company is ordered to be reduced. This has a double effect, for not only are the rates thus reduced, but they are fixed and the railroad company can not raise them. Nor can it adjust its rates, raising some and lowering others. The fact is that, as stated by the Pennsylvania court, the rate-making power of the company is superseded and taken away from it and rates are made for it by the Railroad Commission—not rates in lieu of extortionate rates, but rates in lieu of all of its rates.

We submit that this order is absolutely void and entirely beyond the power of the Commission.

THE ORDER OF THE COMMISSION IS VOID IN PROHIBITING THE SOUTHERN RAILWAY COMPANY FROM RAISING ITS RATES UP TO THE STANDARD FIXED IN THE SCHEDULE OF MAXIMUM RATES.

The order of the Commission provided that if any rate in force on the Southern Railway Company was lower than the rate fixed by the Commission in its schedule of maximum rates, the Southern Railway Company could not charge the rate fixed in the schedule, but must continue to charge its rate then in force.

In other words, the Commission ordered that every rate in force on the Southern Railway Company must continue in force provided such rate was lower than the rate which the Commission itself fixed in its maximum schedule of rates, although, by fixing such rates in its maximum schedule of rates, the Commission adjudged them to be reasonable.

The only authority which the Commission had under the statute is, upon finding a rate to be extortionate to make a new rate. There is absolutely no authority for it to do anything if it finds a rate complained of to be reasonable. In other words, the finding that a rate being charged is extortionate is a condition precedent to any order which may be made by the Commission; and yet, notwithstanding this, the Commission not only fixed a schedule of maximum rates and provided that this schedule should continue without regard to whether the rates contained in that schedule were the same rates then being charged by the Railroad Company, but went farther and held that where the rates so fixed by the Commission were higher than the rates charged by the Railroad Company, the Railroad Company could not advance its rates to the standard fixed by the Commission.

To see how this order operates, if the Court will turn to the record at page 58 it will find a table showing a comparison of the present rates of the Southern Railway Company with the rates prescribed in the Railroad Commission's order of June 20, 1906. This table shows the present rates, the Commission's schedule, and the reduction in the present rates. In a very large number of instances there is no reduction at all, so that the Railroad Commission first goes through the form of declaring all the rates of the Southern Railway Company extortionate and then fixes for it a schedule of rates which, in a very large number of cases, is exactly what the rates were before. The Southern Railway Company, however, had certain commodity or jobbing rates in effect. A table of these will be found at pages 60, 61, 62, 63, 64 and 65 of the Record. There are here no less than 333 rates which are lower than the rates fixed by the Commission. In some cases the rates are as much as 6 cents below the rates fixed by the Commission; and yet the Southern Railway Company is forbidden to raise any of these rates to the scale of rates adjudged by the Railroad Commission itself to be reasonable.

There is, as we have pointed out above, absolutely no power in the Commission to deal with any rate unless it finds it to be an extortionate rate. Surely it is a curious thing for the Railroad Commission to claim that a rate lower than the one it approves of is an extortionate rate. It does not even do that. It does not adjudge it to be extortionate, but simply adjudges that it can not be altered. We are utterly unable to find in the statute any sort of authority for this order.

The question arises—assuming the order directing that the Southern Railway Company can not raise these jobbing rates to be void, does that make the whole schedule void? The case may be put in a stronger way than this: The only authority which the Railroad Commis-

sion had was, upon finding a particular rate to be extortionate, to fix a new rate, necessarily a lower rate. It has made a complete new schedule of rates for the Southern Railway Company. A large number of these rates are the same as the company was charging before the order of the Commission was made. As to these the Commission had no right to do anything whatever. A very large number are lower than the schedule fixed by the Commission itself. Certainly with these it had no power to deal. It could not declare them extortionate on the one hand and it had absolutely no right to deal with them unelss it did declare them to be extortionate. Under these circumstances we submit that necessarily this whole body of rates fixed by the Railroad Commission must fall. Assuming that the Railroad Commission had the right to deal with the matter of rates by making a schedule, we submit that the result is a conglomerate of the exercise of powers granted and not granted, so that it is impossible to separate the valid from the invalid, and the whole order must fall.

We respectfully submit, therefore, that upon these questions the judgment of the lower court must be affirmed.

Respectfully,

ALEXANDER POPE HUMPHREY,

Attorney for Southern Railway Company in Kentucky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 524

ADAM T. SILER, McDOUGAL FERGUSON AND LEW P. TARLETON, CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY,

APPELLANTS,

vs.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY

APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT.

The statement contained in the brief of appellants, filed in the four cases numbered 521, 522, 523, and 524, is substantially correct and we shall not repeat; but we do want to call attention to some matters not shown therein.

The Cincinnati, New Orleans & Texas Pacific Railway Company operates a line of railroad commonly called The Cincinnati Southern Railway, extending from the City of Cincinnati, in the State of Ohio, to the City of Chattanooga, in the State of Tennessee. It is the railroad that was constructed and is owned by the City of Cincinnati, and is leased to and operated by this appellee. There is only a little over a mile of road in Ohio, as it starts in the City of Cincinnati and immediately crosses the Ohio River into Kentucky. It intersects that State from its northern to its southern boundary for a distance of 197 miles upon a line almost equally distant between the eastern and western boundaries of the State. The scale of freight rates in force upon this road, substantially since its first operation, has been and is exceedingly low. So much so, that in the investigation before the Railroad Commission of Kentucky, resulting in the establishment, by said Commission, on the 20th day of June, 1906, of a Schedule of Maximum Rates, styled "Maximum Rates, Kentucky Railroad Com-

mission Standard Tariff No. 1," complained of herein, the rates fixed and charged by this appellee were referred to constantly as the model for all railroads in Kentucky; and, as shown by paragraph 8 of the Bill of Complaint filed by appellee in the court below (page 7 record herein) "no proof was offered or introduced by any of the complaining parties or by anyone before the defendants (meaning the appellants herein), that any rate or rates of this complainant were unjust, extortionate, or unreasonably high. No evidence was introduced before the said defendants, showing the conditions or circumstances surrounding tariff handled by this complainant, the expense of conducting various classes of tariff, the character of such tariff, or any other fact from which such defendants could form any judgment that any of the rates charged by this complainant were unjust, unreasonable or extortionate; on the contrary, it was stated by counsel for the plaintiffs in said hearing, including the special counsel of the Commonwealth of Kentucky that *not a shipper had been heard to complain against the rates charged by this complainant, and the Commonwealth asked no relief against it.*"

Notwithstanding this situation, the Railroad Commission of Kentucky, by its order of June 20, 1906, made the so-called "Maximum Rates, Kentucky Railroad Commission Standard Tariff No. 1," applicable to this appellee; and wherever appellee's scale of rates was in excess of said mileage scale of rates fixed by the Commission, appellee was forbidden to charge, collect or receive rates in excess of those permitted to be charged in said Standard Rate fixed by the Commission, with a proviso, however, that wherever the rates of this appellee were lower than those fixed by said Standard Scale, appellee should not be permitted to charge, collect or receive, rates in excess of said lower rates as now published by said appellee.

The effect of this order was to require appellee to reduce its rates in a number of instances, especially for short distance hauls, and to deprive it of several thousand dollars a year of income, and at the same time, to prevent this appellee from equalizing this loss by increasing any of its rates which were lower than the said standard fixed by the Commission. This may be better understood by a reference to the table shown on pages 57, 58, 59, 60, 61 and 62 of the record in this case. This table shows:

(A). Rates in effect on C. N. O. & T. P. Ry.

(B). Rates prescribed by the Railroad Commission.

(C). Amount of reductions prescribed by Railroad Commission.

(D). Difference where rates of the C. N. O. & T. P. Ry. are lower than Kentucky Commissioners' Scale.

To save the necessity of a closer study of this scale it may be said that it shows a total of 464 rates, of which there are 135 where the rates established by the Commission are lower than the existing rates on the C. N. O. & T. P., 45 cases in which the rates established by the Commission are the same as the rates charged by the C. N. O. & T. P., *and 284 cases in which the rates of the C. N. O. & T. P. are lower than those established by the Commission;* and a most cursory examination will show that the 284 rates will aggregate very much lower in amount than the other rates where the Commissioners' scale is lower than the railroad's scale.

This appellee complains especially of this order as invalid, because

(1). There is no authority under the laws of Kentucky, assuming those laws to be valid, to authorize the Commission to fix a rate, unless it first finds that the Company has been guilty of extortion, when, and in which event, "it may make and fix a just and reasonable rate, toll or compensation which said Railroad Company may charge, collect or receive for like services thereafter rendered."

(2). Because the act set out in the brief of appellents, pages 2, 3 and 4 is unconstitutional, and therefore confers no authority or power upon said Commission to make rates at all.

ARGUMENT.

As to the first proposition which we make, it seems to us that a mere statement of it is sufficient. The act authorizing the Commission to act, herein above referred to, provides, in Section 1, that when complaint is made to the Railroad Commission, accusing a railroad company of charging, collecting or receiving extortionate freight or passenger rates, or when the Commission shall receive information, or have reason to believe that such rate or rates are being charged, etc., it shall be the duty of the Commission to hear and determine the matter as speedily as possible, and that after a hearing therein provided for, if the Commission should determine that the Company or corporation is or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered; and if a railroad company or corporation shall thereafter charge a greater or higher rate, toll or compensation than that fixed by the Commission, said company or corporation, or any officer, agent or employe thereof, shall each be deemed *guilty of extortion*, and shall be punished as in the act provided.

The order made by the Commission, and which is involved in this case, so far as this appellee is concerned, reduced 135 rates, de-

claring such rates to be extortionate, and fixed what the Commission determined to be just and reasonable rates to take the place of the so-found extortionate rates.

The Commission then found that there were 45 rates in existence which were not extortionate, and they made an order that those rates should remain the same, and that there were 284 rates which were much below what the Commission said would be just and fair and reasonable rates to charge and yet, that the Railway Company having once fixed and agreed to do business for these rates below a reasonable and just charge, should be forever prohibited and prevented from coming up to the rates fixed by the Railroad Commission as a just, fair and reasonable charge, and required to keep such 284 rates down below such just, fair and reasonable charge indefinitely.

The power conferred upon the Commission *is to act in cases where they find a rate to be extortionate,* and in such cases to fix a just and reasonable rate. If a rate is just or reasonable, or if it is below what would be just and reasonable, the Commission has no power or authority under the act in question to make any order with reference to such rate or rates.

The Commission, however, in this instance made a general schedule of rates on a mileage basis, with the result hereinbefore set out, and we submit that inasmuch as 45 of these rates were unchanged and 284 were below the fixed reasonable and just charge made and fixed by the Commission, that the whole order was null and void; because it is not to be presumed that the Commission would have undertaken to fix a standard scale of mileage rates for certain distances, or in certain cases, and not for all the distances and all cases involved.

This Company is a resident of the State of Ohio, and there is no question of the Jurisdiction of the United States Circuit Court in this case, and if the order as made was without authority of law, assuming the laws to be valid, then the judgment of the court below should be affirmed on that ground.

Constitutionality of So-Called McChord Law.

The act of March 10, 1900, is commonly called the "McChord Law," and will be so referred to herein. It gets that name from the distinguished counsel who briefed this case for appellants who was at the time of the making of the order complained of, the Chairman of the Railroad Commission of Kentucky, and at the time of the passage of said act, a member of the State Senate of Kentucky, and the author of the law.

In discussing the constitutionality of this act, we submit that the judgment of the United States Circuit Court for the District of Kentucky, reported in 103 Fed. 216, stands unimpeached and is the law. When that case reached this court on appeal, and was decided in 183 U. S. 483, the only point decided, as we understand it, was that the action then under consideration was premature in that the Commission had not then acted. The court in that case, closing its opinion, through Mr. Chief Justice Fuller, used these words:

> "The result of these considerations is that the duty of enforcing its rates rests on the Commission, and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition, before the rates are fixed at all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance which were pressed in argument as if now requiring adjudication."

In presenting our argument as to the unconstitutionality of this law and therefore the invalidity of the order involved, we shall present three distinct propositions, which we will state in logical order, and each of which we will endeavor to maintain.

I.

A legislative act which prescribes a penalty against a common carrier for charging and collecting a rate for the transportation of a passenger or of freight in excess of a maximum rate fixed by it, or fixed by an administrative board under its authority, and which does not permit the common carrier in a proceeding to enforce the penalty to question the justice and reasonableness of the rate fixed, is unconstitutional.

This proposition is itself a conclusion drawn from several subordinate propositions.

1st. A Legislature has no unlimited power to fix such rates, nor has it power to confer unlimited power on an administrative board to fix them.

It is well settled that a Legislature has power to fix such rates and that it has power to confer power on an administrative board to fix them. When fixed by the Legislature, it is said to be done in the exercise of a legislative function. When fixed by an administrative board under authority from the legislators, it is said to be done in the exercise of an administrative function.

As said by Mr. Justice Brewer in

Reagan v. *Farmer's Loan & Trust Co.*, 154 U. S., 362:

"There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad and other carriers and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its Legislature."

The power to fix rates by the Legislature itself in the exercise of a legislative function has been recognized and upheld by this court in the following cases:

Munn v. *Illinois*, 94 U. S., 113.
C. B. & Q. R. R. Co. v. *Cutts*, 94 U. S., 155.
Peck v. *Chicago & Mo. Ry. Co.*, 94 U. S., 164.
Winona, etc., Ry. Co. v. *Blake*, 94 U. S., 179.
Ruggles v. *People of Illinois*, 108 U. S., 536.
Dow v. *Beidelman*, 125 U. S., 680.
Chicago & G. T. R. Co. v. *Wellman*, 143, U. S., 339.
Budd v. *State of New York*, 143 U. S., 517.
St Louis & S. F. R. Co. v. *Gill*, 156 U. S., 649.
Covington & L. Turnpike Road Co. v. *Sandford*, 164 U. S., 572.
Smyth v. *Ames*, 169 U. S., 466.
Ex parte Young, 209 U. S., 123.

The power to fix rates by a commission or other administrative board in the exercise of an administrative function when so authorized by the Legislature has been recognized and upheld by this court in the following cases:

Spring Valley Water Works v. *Schottler*, 110 U. S. 347.
Stone v. *Farmer's Loan & Trust Co.*, 116 U. S., 307.
Georgia R. R. & Banking Co. v. *Smith*, 130 U. S., 174.
Chicago, M. & St. P. R. R. Co. v. *State of Minnesota*, 134 U. S., 418.
Reagan v. *Farmer's Loan & Trust Co.*, 154 U. S., 362.
San Diego v. *National City*, 174 U. S., 740.
Chicago, M. & St. P. R. Co. v. *Tompkins*, 176 U. S., 167.

But the Legislature has not unlimited power in this matter nor can it confer unlimited power upon a commission. Expressions may be found to the contrary in the decisions of this court. In *Munn* v. *Illinois*, Mr. Chief Justice Waite said:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts."

And again in *Peck* v. *Chicago & N. W. Ry. Co.*, he said:

"Where property has been clothed with a public interest, the Legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change."

And Mr. Justice Bradley, in his dissenting opinion, concurred in by Mr. Justice Gray and Mr. Justice Lamar, in the case of *Chicago, M. & St. P. R. R. Co.* v. *State of Minnesota*, said:

"I repeat, when the Legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not until then, is it a judicial question. But the Legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

"This is just where I differ from the majority of the court. They say, in effect, if not in terms, that the final tribunal or arbitrament is the judiciary; I say it is the Legislature. I hold that it is a legislative question, not a judicial one, unless the Legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there."

The question was not involved in the Munn and "Granger" cases and hence these expressions were mere *obiter dicta*. As said by Mr. Justice Brewer in *Reagan v. Farmer's Loan & Trust Co.*:

"There was in those cases no decision as to the extent of control, but only as to the right of control."

And the expression quoted from the Minnesota case was, as stated, contained in a dissenting opinion. But whatever tendency there may have been in this court or any member of it, at the beginning and in the earlier period of the development of the law on this subject, to go to this extreme length in upholding legislative action, that tendency no longer exists. No one questions now that the power of the Legisalture in this particular is a restricted and a limited one. But we regard the truth of this proposition to be so essential to the validity of our argument in this case—being, indeed, the foundation upon which the entire structure is built—that we think it important to make it plain—to drive it home—by copious quotations from the opinions of this court.

We are not concerned with limitations upon this power arising out of a previous contract between the Legislature and a particular corporation by which the right to exercise the power has been granted away in that particular instance, or due to Subdivision 3 of Section 8 of the United States Constitution, conferring power upon Congress

to regulate commerce of a certain description. These limitations have always been recognized, and a considerable portion of the litigation in this court on this subject of rates has grown out of the attempt to apply this limitation of previous contract. Indeed, in the case of *Georgia R. R. & Banking Company* v. *Smith*, Mr. Justice Field called attention to the fact that " in almost every case which has been before this court, where the power of the state to regulate the rate of charges . . . has been under consideration, the question discussed has not been the original power of the state over the subject, but whether that power had not been . . . surrendered to the company or been in some manner qualified." Since that decision was rendered the discussion has not been so limited, but has taken a much wider range. So far as the limitation imposed by the commerce clause of the Federal Constitution is concerned, it has been but little, if at all, involved in the cases which have arisen in this court.

But the contract limitation has relation to the conditions under which the power in question may be exercised, and the commerce limitation has relation to the field or territory in which it may be exercised.

What we are concerned with is the limitation, if any, upon the power itself and that in relation to local or intrastate traffic.

That there is a limitation on the power itself within this field was first stated by Mr. Chief Justice Waite, who had made use of the broad expressions above quoted, in the case of *Stone* v. *Farmer's Loan & Trust Co.* He there said:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

According to this, then, the Legislature can not destroy or confiscate—can not require carrying of persons or property without reward—and can not do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.

In the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*, Mr. Justice Blatchford said:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due

process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

According to this, the rates fixed or authorized to be fixed by the Legislature must be "reasonable," and if not, the act of fixing them amounts to a taking of property without due process of law and to a deprivation of equal protection of the laws and is invalid.

In the case of *Reagan* v. *Farmer's Loan & Trust Co.*, Mr. Justice Brewer states one of the questions involved in that case in these words:

"It appears from the bill that, in pursuance of the powers given to it by this act, the State Commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into the matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts."

He then proceeds to consider the defendant's contention, and after showing that it was untenable, both on principle and authority, he asks, and proceeds, at length, to consider this question:

"Were the rates, as prescribed by the commission, unjust and unreasonable?"

The result of this consideration is an affirmative answer, and because of it, this court affirmed the judgment below restraining the defendants from enforcing the rates already established.

In the case of *Covington & L. Turnpike Road Company* v. *Sandford*, Mr. Justice Harlan said:

"We have then the case of a corporation invested by its charter with authority to construct and maintain a turnpike road, and to collect tolls 'agreeable' to certain named rates, and which is required by a subsequent legislative enactment to conform to a tariff of rates that is unjust and unreasonable, and which also prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders. These facts are admitted by the demurrer. Is such legislation forbidden by the clause of the Constitution of the United States declaring that no state shall deprive any person of property without due process of

law? We are of opinion that, taking, as we must do, the allegations of the answer to be true, this question must be answered in the affirmative."

It was therefore held that that subsequent legislative enactment was invalid.

In the case of *Smyth* v. *Ames*, Mr. Justice Harlan said:

"A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."

In this case, the justice and reasonableness of the rates prescribed by the Nebraska act involved therein were elaborately considered, and it being held that those rates, without reference to interstate business, were unjust and unreasonable, the act was held invalid.

And in the case of *Chicago, M. & St. P. R. R. Co.* v. *Tompkins*, Mr. Justice Brewer said:

"It is often said that the Legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the Legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if, after determining that certain property shall be taken for public uses, the Legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates."

These authorities are sufficient to leave no room for claiming at this late day that the Legislature has unlimited power to fix local rates, or in conferring authority on a commission to fix them. It is certain that it will not be claimed that it has such power. Indeed, the brief of appellants, conceeds that it has not. The rates fixed must be just and reasonable—or, at least, they must not be

"so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public." This limitation on legislative power exists. It is not very definite, and this court has recognized that it is extremely difficult to apply to any specific case. No general rules exist governing its application. As has been said, "each case must depend upon its special facts." But though this is so, the existence of the limitation on the legislative power is as certain as the legislative power itself; and that equally so, whether it acts directly or through a commission. No difference exists in this particular between the two modes of action. In the case of *Reagan v. Farmer's Loan & Trust Company*, it was held that the power to fix rates had been exceeded by a commission in that it had fixed unreasonable and unjust rates; and in the cases of *Covington & L. Turnpike Road Company* v. *Sandford* and *Smyth* v. *Ames*, it was held that that power had been exceeded in each instance by the Legislature itself in that it had fixed unreasonable and unjust rates.

We are now prepared to take another step forward.

3d...The courts have the power and the right to inquire and determine whether the Legislature or commission, as the case may be, has exceeded its power in the fixing of the rates and fixed rates that are unreasonable and unjust, and, if the result of the inquiry is a determination that the power has been exceeded, to declare the rates so fixed invalid and enjoin their enforcement, and in so doing, they exercise a judicial function.

This proposition follows necessarily from the foregoing proposition. But we are not left to inference. It has been expressly recognized by this court in the opinions in many of the cases referred to above, as shown by some extracts therein already quoted.

Further extracts can be made to the same effect. In the case of *Reagan* v. *Farmer's Loan & Trust Company*, Mr. Justice Brewer said:

"The courts are not authorized to revise or change the body of rates imposed by a Legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

And again:

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all the owners of other property."

In the case of *St. Louis & S. F. R. Co.* v. *Gill*, Mr. Justice Shiras said:

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

In the case of *Smyth* v. *Ames*, Mr. Justice Harlan said:

"While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, can not be so conclusively determined by the Legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In the case of *San Diego L. & T. Co.* v. *National City*, Mr. Justice Harlan said:

"In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the Legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judicial question arises, and the courts, Federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law."

In the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, Mr. Justice Brewer said:

"Few cases are more difficult or perplexing that those which involve an inquiry whether the rates prescribed by a state legislature

for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws, and not of men."

And again:

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

As to the exercise of this power by the judiciary Mr. Justice Brewer in the case of *Reagan* v. *Farmers' Loan & Trust Company*, says:

"There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has often been observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

As to what sort of a case is necessary to be made out in order to justify the courts in overthrowing the rates fixed, Mr. Justice Harlan, in the case of *San Diego L. & T. Co.* v. *National City*, said:

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will

necessarily have the effect to deny just compensation for private property taken for the public use."

And Mr. Justice Brewer, in the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, said:

"In approaching the consideration of a case of this kind we start with the presumption that the act of the Legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld."

Though in the case of *Reagan* v. *Farmer's Loan & Trust Company*, the same learned Justice semed to put a rate fixed by the Legislature or a commission on a par with a rate fixed by a carrier when its rate was being investigated. He there said:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the Legislature, instead of the carrier, prescribed the rates."

It was in the exercise of this power that this court invalidated the rates involved in the three cases of *Reagan* v. *Farmers' Loan & Trust Co.*, *Covington & L. Turnpike Company* v. *Sandford* and *Smyth* v. *Ames*.

This power and right in the judiciary which is an absolute power and right, without condition or limitation, being conceded and established, we are prepared to make another advance.

3d. *The Legislature, having a limited power over the subject of rates, and the judiciary, having an absolute power and right to determine whether rates fixed by the Legislature, or under its authority, are unreasonable and unjust, the Legislature can not take away this power and right or curtail it in any respect.*

This proposition is really not an advance upon the preceding propositions, as it is involved in them. It is though an advance on the form of statement and has the advantage of bringing to the light and stating expressly that which is involved in what has gone before. By no sort of device or provision of law can the Legislature take away or curtail, in any respect, this power and right. For if it can, its power is absolute and not limited, and the power and right of the

judiciary is not absolute to the extent stated, neither of which propositions are true, as we have seen. The Legislature can not expressly provide that the judiciary can not consider and determine whether rates fixed by it or under its authority are unreasonable and unjust. It cannot provide that rates fixed by it or authorized to be fixed by it shall be final and conclusive upon the judiciary. It can not provide a specific remedy for the enforcement by the judiciary of the rates so fixed, and require the judiciary to enforce them, irrespective of their reasonableness and justice. If it does provide a remedy for their enforcement by the judiciary, it must leave room, in the proceeding so authorized, for the latter to consider their reasonableness and justice, and if it determines that they are unreasonable and unjust to refuse to enforce them, in that proceeding, and thus render the proceeding unavailing, as a method of enforcing the rates in question. It is not sufficient that the rates may be overthrown in other proceedings instituted by the party affected. The right to overthrow them must exist in the very proceeding in which they are sought to be enforced. Otherwise, the power of the judiciary is limited and curtailed, which, as we have seen, can not be. It seems to us that it is not possible to pick any flaw in this argument and it is not without support in the decisions of this court. In the case of *Smyth* v. *Ames*, Mr. Justice Harlan, most vigorously, said:

"But, despite the difficulties that confessedly attend the proper solution of such questions, the court can not shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the Legislature of the state has declared such to be the case, for that would make the state Legislature the final judge of the validity of its enactment., although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given to the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

And the point was distinctly in issue and disposed of in the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota.* The Minnesota act of 1887 authorized a commission to fix rates and to institute proceedings in the Supreme Court of the state in mandamus, against the party affected by them, to put them in force. It did not permit that party to question the reasonableness and justice of the rates fixed in the mandamus proceeding. On the contrary, it was the intention of the Legislature that such party should not have a right to raise such question therein, but that the rates fixed by the commission should be final and conclusive, and that all the Supreme Court should have to do in the matter was to compel obedience to them. Some tenderfootedness has been shown in subsequent decisions of this court in accepting such to be the true construction of the act in question in that case, and there is room to suspect a disposition to blame the Supreme Court of Minnesota for that construction, by calling attention to the fact that this court was not responsible for it. As for example, in the case of *San Diego L. & T. Co.* v. *National City*, Mr. Justice Harlan said:

"Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that state."

But why was not that the true construction of the statute? We submit that it was and that it is impossible to get away from the reasoning of the court so holding. It was the province of that court to construe that statute and its construction was the true intent and meaning of the statute, so far as this court was concerned, and that was an end of the matter. This, however, by the wayside. Such being the true intent and meaning of the statute, it was held unconstitutional. Mr. Justice Blatchford said:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission.

In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

There is no gainsaying the correctness of this statement of the law: In the subsequent case of *Budd* v. *State of New York*, Mr. Justice Blatchford showed a disposition to limit it to a case where the rates were fixed by a commission and to hold that it had no application to a case where they had been fixed by the Legislature itself. He said, for example:

"What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed by the Legislature."

This attempt at a distinction between the two classes of cases is to be traced to the lingering influence of the broad statements in the Munn and "Granger" cases, and Mr. Justice Bradley's dissenting opinion in the Minnesota case, as to the absolute power of the Legislature in fixing rates. It has no more absolute power to fix rates than it has power to confer absolute power on a commission. And the judiciary has absolute power to consider the reasonableness and justice fixed by the Legislature, as much as it has such power as to rates fixed by a commission. The cases of *Covington & L. Turnpike Road Company* v. *Sandford*, and *Smyth* v. *Ames*, following in the track of *Reagan* v. *Farmers' Loan & Trust Company*, settle this. There is no such distinction, we submit, between the two classes of cases.

4th. *The Legislature being powerless to take away this power and right of the judiciary to inquire into and determine the reasonableness and justice of the rates fixed, it can not be claimed that they are final and conclusive on the judiciary for any portion of time after being so fixed.*

As, for example, they can not be claimed to be final and conclusive until the common carrier affected by them has filed a bill in chancery in a proper forum to have them adjudged invalid, much less

until they have been so adjudged. No doubt exists as to the right of the common carrier to institute such proceedings, but the penalty of not instituting them is not submission to the rates and to any attempt to enforce them against it. If such attempt is made, it has the right in the proceedings, in which the attempt to enforce them is made, to question their validity and to ask the court, as appealed to, to adjudge them invalid if the facts so warrant. To hold otherwise is to deny absolute power and right in the judiciary to consider and determine the reasonableness and justice of rates fixed and to concede that the Legislature can, to some extent, curtail it. Hence, we submit that Mr. Justice Miller was in error in his dissenting opinion in the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*, when he said:

"That the proper, if not the only mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

He, at once, conceded away his suggestion that a bill in chancery might be the only mode of judicial relief against a tariff of rates by holding that in the mandamus proceedings involved in that case the court had "the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery." He so held because such a proceeding was "equivalent" to a bill in chancery. But, the real ground for so holding is the absolute power of the judiciary to so inquire without interference on the part of the Legislature, in any way, or to any extent. This ground demands also that the common carrier should have the right to raise a contest in the courts as to the reasonableness of the rates fixed in any proceeding of any character or description in which the aid of the court is sought to enforce them to any extent; at least, in any proceedings which the Legislature provides by statute for their enforcement. Hence, also, we submit that Mr. Justice Shiras' qualification of Mr. Justice Miller's position in the case of *St. Louis & S. F. R. Co.* v. *Gill*, is equally untenable. He there said:

"Sometimes in acting on this subject the state legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed—that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected.

"But there are othere cases, and the present is one, where the legislatures choose to act directly on the subject by themeslves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

He thus denies the application of Mr. Justice Miller's position to a case of rates fixed directly by the Legislature because of a supposed lack of opportunity to raise the question of their reasonableness, in such a case, by bill in equity. But suppose the Legislature not only fixes rates and prescribes penalties, but provides that the penalties prescribed shall be adjudged against the common carrier only in proceedings instituted by a commission. Is there not an opportunity in such a case to raise the question by bill in equity, and, if so, would, or not, Mr. Justice Miller's position apply thereto? The truth is, that it is not lack of opportunity to raise the question of their reasonableness by bill in equity where the rates have been fixed by the Legislature itself, which is the real ground why, in such a case, the common carrier has a right to raise the question by way of defense to a statutory or other proceeding to enforce them, and is not bound to resort to such bill. It is because of the absolute power of the judiciary to inquire into and determine that question whenever its aid is invoked in this way. Why should the fact that the question can be raised by bill in chancery filed by the common carrier, where opportunity exists to do so, deprive the common carrier, in proceedings statutory or otherwise, instituted against it to enforce the rates, to raise the question by way of defense to such proceedings. Mr. Justice Miller concedes that that fact does not deprive it of the right to raise that question in that way in mandamus proceedings. Then why should it have the effect of depriving it of such right in any other duly authorized proceeding brought to enforce them? It must be either because the Legislature has some control over the judiciary in this particular or because the judiciary has power to decline to exercise some part of its jurisdiction when properly called on to do so, neither of which alternatives, we submit, is true.

This leads us to direct attention to the phraseology in which the right of a common carrier as to rates fixed by the Legislature or by a commission under its authority should be stated. Unless correctly stated, it is liable to be the source of confusion and error what its real right is. It is frequently stated that it is a right to a judicial hearing as to the reasonableness of the rates so fixed. It is certainly that, but if that is all it is, then an opening is left for falling into the position of Mr. Justice Miller, as qualified by Mr. Justice Shiras—that where the common carrier has an opportunity to file a bill in chancery raising the question as to the reasonableness of the rates so fixed, it can not raise it by way of defense in proceedings instituted against it to enforce those rates, except in mandamus proceedings; for in that way it can get a judicial hearing. But that way of stating its right is too indefinite. It is a right to a judicial hearing not only in a court of chancery, where, having an equity, it can, on its own motion, bring the matter, but in any court where those rates are sought to be enforced against it, whether it has brought a suit in chancery or not.

This, we submit, necessarily grows out of the correctness of the positions which we have heretofore advanced and attempted to maintain.

5th. *The power of the Legislature on subject of rates being limited to the extent stated and the judiciary having absolute power to inquire and determine whether the limit has been exceeded, it follows that the Legislature can not take it away or curtail it by any investigation which it may make into the matter of rates, or require to be made by a commission before it can exercise authority conferred on it to fix them.*

It may give the common carrier affected the fullest hearing possible before it, or its committees, before fixing the rates itself, or it may provide for such a hearing before a commission before that body is empowered to fix rates, but it cannot make such a hearing before it or its committees or before the commission a basis of denying to the judiciary the power to investigate the matter for itself, otherwise it has not the absolute power claimed for it. It may be that if it provides for the fixing of rates by a commission, it should also provide for notice of its sessions, at which the rates are to be fixed, and for a hearing by the common carriers affected. Mr. Justice Blatchford seems to intimate this in *Chicago, M. & St. P. R. Co.* v. *State of Minnesota.* He said:

"No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and, although in the present

case, it appears that, prior to the decision of the commission, the company appeared before it, by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at."

But we are not concerned with maintaining the correctness of this position. The point we are urging is, that a hearing before any other body or organization, no matter how full and ample, is not and can not be made a substitute for the judicial investigation and hearing which the common carrier is entitled to. There is nothing in the case of *San Diego L. & T. Co.* v. *National City* to the contrary of this. A part of the town company's contention in that case is thus stated by Justice Harlan:

"It is said that the State Constitution and laws authorized rates to be established without previous notice to the corporation or person immediately interested in the matter, and without hearing in any form, and therefore were repugnant to the clause of the Federal Constitution declaring that no state shall deprive any person of property without due process of law."

In other words, the want of hearing complained of therein was a hearing before the body empowered by the California laws to fix rates, and no doubt the statement quoted from Mr. Justice Blatchford's opinion in the Minnesota case was relied on in support of the complaint. It was this contention that Mr. Justice Harlan combatted in a portion of his opinion in that case, and which he held to be untenable. It was not a question in that case whether, because of the hearing which it was held was provided for before that body, in those laws, the town company did not have a right to be heard again in the courts as to the reasonablenes of the rates fixed. On the contrary, another contention of the town company, in that case, was that the rates fixed were unreasonable, and this court considered and disposed of that contention also, and there was no intimation, from any quarter, that it did not have the right to do so.

A direct authority in support of the position, we are now endeavoring to maintain, is the recent case of

Western Union Tel. Co. v. *Myatt*, 98 Fed., 335.

The act of January 3d, 1899, passed by the Kansas Legislature, created a body which it termed a court of visitation, and gave it power to regulate the business of railroad and telegraph lines within that state, and, amongst other things, to prescribe schedules of rates and to determine the reasonableness of such rates in proceedings had before it upon due notice and opportunity to be heard, and heavy penalties were

provided for charging rates in excess of rates adjudged by it to be reasonable.

It was held in that case that the body created by it, though termed a court, was a legislative and administrative body, and that the right of the judiciary to consider and determine the reasonableness of the rates fixed could not be ousted in this way.

Hook, District Judge, said

"I am, therefore, of the opinion that a proceeding before the court of visitation, in which it is sought to secure a judgment upon the reasonableness of a body of rates prescribed by it to be charged by a railroad or telegraph company, would not be due process of law within the meaning of the Federal Constitution."

This conclusion is a deduction from this admirable and concise statement of the law on the subject of rates made by him in a former part of his opinion:

"Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing and prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our juris-prudence (*Reagan* v. *Trust Co.*, 154 U. S., 362; 14 Sup. Ct., 1047; 38 L. Ed., 1014; *Smyth* v. *Ames*, 169 U. S., 466; 18 Sup. Ct., 418; 42 L. Ed., 819). It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or *quasi* public service, because that is a legislative prerogative, and that the Legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law—to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

The result of the whole matter then is that in any proceedings in court against a common carrier to enforce rates fixed by the Legislature or a commission, the common carrier has the right to have that court, in that proceeding, to consider and determine whether the rates, so fixed, are unreasonable and unjust, and if it so determines to refuse to enforce them, and that its right so to do is not at all affected by the fact that it has a right and an opportunity to bring the matter into chancery on its own motion by bill in equity or by the further fact that the rates have been fixed after the fullest investigation and opportunity to be heard by the Legislature or commission, as the case may be. And as stated by Mr. Justice Brewer in the Texas case, there is nothing "new or strange" in this.

6th. *If, then, the Legislature, by an act duly passed fixes rates or authorizes a commission to fix them, and provides further that the common carrier shall be subject to a penalty if it charges rates in excess of those so fixed, and does not permit the common carrier, in the proceeding, to recover the penalty to raise the question as to the reasonableness of the rates fixed, i. e., expressly provides that that question shall not be raised therein, or omits to so provide, intending that it shall not be raised therein, but that the penalty shall be affixed and the rates thus enforced irrespective of that question, the Legislature has denied the common carrier its right and exceeded its constitutional power.*

It is not up now whether, in any particular instance, the Legislature has so acted. That question will arise further on. It is well to dispose of one thing at a time. The position now taken is that, if the Legislature has so acted, its action is unconstitutional. This is the proposition advanced in the beginning, and which we have undertaken to maintain. We submit that it is the necessary conclusion to be drawn from what has been heretofore said.

In the case of *Spring Valley Water Works* v. *Schlotter*, arising under the California Constitution and statutes, with reference to water rates, the same considered in the late case of *San Diego L. & T. Co.* v. *National City*, Mr. Chief Justice Waite said:

"The question before us is not as to penalties to be inflicted on the company for a failure to sell at the prices fixed, but as to the power to fix the price."

And in the case of *Regan* v. *Farmer's Loan & Trust Company*, involving the Texas statute, Mr. Justice Brewer states, as amongst the objections urged against it, the following:

"Specific objections are made to the act on the ground that, by Section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by Section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that the railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable,

there is nothing to prevent the commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable and oppressive regulations may be prescribed by the commission."

Concerning these objections, he had this to say:

"We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged—that which establishes the commission and empowers it to make reasonable rates and regulations for the control of railroads. It is familar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the Legislature would not have enacted that which is within, independently of that beyond its power. Applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the Legislature would not have established the commission and given it power over railroads without these independent matters. In other words, it is not to be presumed that the Legislature was legislating for the mere sake of imposing penalties, but the penalties and the provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the Legislature in its enactment. Take a similar body of legislation—a tax law. There may be incorporated under such a law a provision giving conclusive effect to tax deeds and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the state depended for its validity upon the penalties for non-payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that the two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that

they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration."

But it does seem to us that the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota* decides the question squarely, though it does not come up in that case in the exact form in which it does in the supposed case under consideration. The Minnesota statute required the Supreme Court of that state to compel the common carriers affected to charge the rates fixed by the commission created by it by writ of mandamus. In the supposed case under consideration the legislative act requires the court given jurisdiction of the matter to assess a fine against the common carrier charging rates in excess of those fixed by it or by its commission, thus indirectly compelling submission thereto and compliance therewith. The only difference between the two cases is in the form of the compulsion. In the one, it is direct; in the other, indirect. If the intention of the Legislature in the one case that, the common carrier should not be permitted to question the reasonableness of the rates fixed in the mandamus proceeding invalidating that act, a like intention in the other case, as to the penal proceeding, should invalidate the latter act.

It may be claimed, however, that the cases of *Dow* v. *Beidelman* and *St. Louis & S. F. R. Co.* v. *Gill*, arising under the Arkansas statute, and *Budd* v. *State of New York*, arising under the New York statute, are direct authorities against our contention. Each statute was a case of rates fixed by the Legislature itself—the Arkansas statute relating to passenger rates and the New York statute to elevator charges. In the one case the passenger affected was authorized to recover a penalty for an overcharge, and in the other provision was made for assessing a fine in criminal proceedings for the overcharge. The two Arkansas cases were appeals from judgments adjudging the statutory penalty in favor of the passengers, who sued therein, and the New York case was an appeal from a judgment assessing the statutory fine in favor of the state. In each case this court affirmed the judgment appealed from. It appears that the New York statute contained no express provision permitting the reasonableness of the rate fixed to be questioned in the criminal proceeding to recover the fine. Whether the Arkansas statute was similar to the New York statute in this respect we are not in a position to say.

Concerning these decisions we have this to say: In the first place they were rendered at a time when this court, or at least certain members of it, seem to have been impressed with the idea that there was a distinction between a case of rates fixed by the Legislature and a case of rates fixed by a commission under authority of the Legislature, as to the power of the courts to inquire into the reason-

ableness of the rates fixed, with an inclination to hold that that power was less in the former case than in the latter, and the statutes involved in those decisions were both cases where the rates had been fixed by the Legislature itself.

As for example, in the case of *Dow* v. *Beidelman*, Mr. Justice Gray said:

"The court has no means, if it would, under any circumstances, have the power of determining that the rate of three cents a mile, fixed by the Legislature, is unreasonable."

And in the case of *Budd* v. *New York*, Mr. Justice Blatchford said:

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if, under any circumstances, we could determine that the maximum rate fixed by the Legislature was unreasonable."

Since then, however, this court has applied the doctrine of the Minnesota and the Texas cases, which were commission cases, to the case of rates fixed by the Legislature in two distinct decisions, the one being that of *Covington & L. Turnpike* v. *Sandford*, where a Kentucky turnpike statute was invalidated, and the other that of *Smyth* v. *Ames*, where the Nebraska statute, fixing maximum railroad rates, was overthrown, so that there is no longer any room for contention as to there being a difference between the two classes of cases in the matter of the right and duty of the courts to consider the reasonableness of the rates fixed, and if found to be unreasonable, to overthrow them.

But again, in neither of the decisions referred to, was the point made that it was the intention of the Legislature, by the provisions of the act in question, therein to deny, to the parties affected thereby, the right to question the reasonableness of the rates fixed in the statutory proceeding provided, and that for that reason, the provision prescribing penalties was invalid. The only question discussed was as to the right to fix rates, at all, and as to whether those fixed were reasonable. If that point was necessarily involved and disposed of in those cases adversely to our contention, there is nothing in the opinions of this court to show that it was conscious of it, and at least, the point was not argued and fully presented before this court. It is, therefore, a clear case where the doctrine of *stare decisis* should not apply. A good statement, as to the conditions under which that doctrine does not apply, may be found in the following extract from the opinion of O'Brien, J., in the case of

Rumsey v. Railroad Company, 133 N. Y., 79.

He said:

"It is no doubt true that even a single adjudication of this court, upon a question properly before it, is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of *stare decisis*, like almost every other legal rule, is not without exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. Chancellor Kent, commenting on the rule of *stare decisis*, said that more than one thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubted, or limited. He added that it is probable that the records of many of the courts of this country are replete with hasty, crude decisions, and such cases ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

But particularly the unconscious decision in those cases of the point in question adversely to our contention, if there be such a decision in them, should not prevail against us when it is in conflict with the principles laid down by this court in the rate cases, and especially in the Minnesota case, upon full discussion and consideration. The "beauty and harmony" of the law, as a system, requires that they should give way, if they are in the way.

The matter has been decided directly in accordance with our contention in the lower Federal courts. In the case of

Richmond & D. R. Co. v. Trammel, 53 Fed., 196,

the Georgia statute involved in *Georgia R. R. & Banking Co. v. Smith*, in this court, was under consideration. It was a suit in equity by the complaining railroad company against Georgia Railroad Commission to enjoin them from instituting suits to collect penalties for alleged violations of a certain freight rate established by the commission. The Georgia act conferred power on the commission to fix rates and provided penalties for charging rates in excess of those fixed by it. It further provided that, in suits brought against any railroad corporation, wherein was involved the charges of such railroad corporation for the transportation of any passanger, freight or car, the schedule of rates established by the commission should "be deemed and taken in all courts in this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for transportation of passengers and freight and cost upon the railroads." The complaining

railroad company contended that the portion of the act prescribing penalties was invalid because, by virtue of the provision referred to, it would not have an opportunity in the suits which the railroad commission proposed to institute, to enforce the penalties against it to show that the rates, which had been fixed by it, were unreasonable and unjust, it being claimed that the words "sufficient evidence" meant "conclusive evidence."

Newman, District Judge, thus put one of the questions in the case:

"If the rate is not reasonable and just, will the railroad company have an opportunity to show this before the penalties are enforced against it, under the peculiar provisions of the act of 1879, making the schedule sufficient evidence of its reasonableness?"

He then states that the case mainly relied upon by the complainant was the Minnesota case, and after quoting therefrom, he says:

"The effect of this decision by a majority of the Supreme Court of the United States is that the question of the reasonableness of a rate fixed by a railroad commission is one for judicial determination."

In answer to defendant's contention that that case should be restricted "to the case made by the Minnesota statute and the peculiar facts existing there," he said:

"The principle announced is too clear and the rule laid down is too broad to be thus restricted."

And in answer to the further contention that the decision in *Budd v. State of New York* was "a departure from the Minnesota case," and after quoting the language of that decision in relation to that case, he said:

"There is nothing in this language to justify the argument that the Supreme Court intended any departure from the rule announced in the Minnesota case, namely, that where a railroad commission had authority to fix just and reasonable rates, the question of their reasonableness is one for judicial investigation."

And he thus concludes:

"So it seems clear that the rule laid down in the Minnesota case is the proper rule to be applied in this case, and when correctly applied, should control it."

In the application of it, however, he concludes that the words "sufficient evidence" did not necessarily mean "conclusive evidence," and that there was reason for thinking that the Supreme Court of Georgia would hold that it meant "satisfactory evidence," or "*prima facie* evidence." He said:

"The Supreme Court of the United States declares, in the Minnesota case, that it is a constitutional right of a railroad company, when sued for violation of rates of transportation as fixed by a railroad commission, to have a hearing, and offer evidence as to the reasonableness of such rates. The Supreme Court of Georgia says that 'powers of the railroad commission must be exercised within legal and constitutional limitations.' It is evident, therefore, that if any other construction can be given the term 'sufficient evidence' than that it is conclusive evidence, the courts of the state will adopt that construction which will not deprive the complainant, or any other railroad company, of its constitutional rights to a hearing; and this court is not sufficiently convinced that the state courts will be compelled to rule against the railroad companies as to the right to offer evidence to justify it in granting the injunction here prayed for on this assumption. Certainly the courts of the state will, if it can be done, give the term in question a construction consistent with its constitutionality, and which will allow the railroad company a full hearing as to the reasonableness of the rate fixed by the commission."

In the case of

Southern Pac. Co. v. Board of Railroad Com'rs, 78 Fed., 236,

the provisions of California Constitution in relation to a commission to fix railroad rates and legislation in pursuance thereof was involved. Heavy penalties were provided for as against any railroad corporation charging rates in excess of what might be fixed by the commission and it was expressly provided that "in all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable." It was held that this latter provision was unconstitutional under the authority of the Minnesota case.

The conclusion of the whole matter then is that, if a legislative act prescribing penalties for charging rates in excess of those fixed by the Legislature or commission, as the case may be, does not permit the party affected thereby to question the reasonableness of the rates fixed in the proceedings to enforce the penalties, which it may do either by expressly providing that the rates shall not be questioned, but shall be conclusive therein, or by omitting to expressly provide that they may be questioned therein, the intention on the part of the Legislature being that they shall not be questioned, but inflicted, whether or no, upon proof of guilt of charging the excess rates, the act is invalid. The fact that the party to be affected may enjoin the enforcement of rates after they have been fixed, if they are unjust and unreasonable, by bill in equity, does not prevent its being invalid, and the power to fix rates goes down with the invalid portion of the act; nor does the fact that the party affected had an opportunity to be heard before the Legislature or commission prevent such portion of

the act being invalid, nor deprive it of the right to such injunction under the circumstances stated.

We have considered the matter as if the law where rates are fixed by the Legislature itself was the same as where fixed by a commission, which we consider to be the present condition of the law as laid down by this court. If, however, there is a difference between the two cases in that the judiciary has less power over the rates fixed in the one case than it has in the other, we would direct attention to the fact that this is a case of rates fixed by a commission.

When we contend that a statute providing a statutory proceeding for enforcing rates must permit a hearing in such a proceeding to be constitutional, we do not mean that it must expressly provide for such hearing therein. What we mean is that the Legislature must not expressly provide that there should be no hearing therein, or it must not omit to provide for it, intending that there shall be no such hearing therein. For the statute is whatever the Legislature intends. The omission of the provision is simply an item bearing on the interpretation of the intention of the Legislature.

II.

The McChord act prescribes heavy penalties to be adjudged against any railroad company or corporation or any officer, agent or employe thereof, for charging and collecting a passenger or freight rate higher or greater than that fixed by the Railroad Commission under the authority of said act, and does not permit such person in the proceeding to enforce those penalties to question the justice and reasonableness of the rates fixed, and, therefore, said act is, in so far, unconstitutional.

The task before us now is to properly construe this act. Is, or not, our contention in regard to its true construction correct?

At the outset let us consider what, if any, effect the fact that the Legislature of Kentucky had no power, as we have shown, to shut out consideration of the question as to the reasonableness of the rates that might be fixed by the Railroad Commission under its authority on the trial of an indictment under the provisions of said act, should have upon the construction thereof. It won't do to say that because the Legislature had no power to do this that it did not in fact attempt to do so. Legislatures do not always pass constitutional statutes. As a matter of fact, it is well known that they often do not do so. The presumption undoubtedly is that the statutes are constitutional, and it must be clearly shown that they are unconstitutional before they

will be disregarded. This is a trite saying in constitutional law. It is well put by Mr. Justice Woods in

Presser v. *People of Illinois*, 116 U. S., 252.

"But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and paramount law."

But if it is clear that the Legislature, in any specific instance, intended to provide that which is unconstitutional, the courts have no power to shape the statute in question, so as to make it constitutional. It has no other alternative than to overthrow it when properly appealed to for that purpose. Courts can not legislate. They can only interpret or overthrow legislation. This is equally trite. But we are not in search of that which is new. We are after established principles and a proper application of them to the case in hand.

There are but two instances, so far as we have been able to discover, in which constitutional provisions have any bearing in the ascertainment of what is existing statutory law, other than to overthrow them as unconstitutional. One is where a constitutional provision goes into effect after a statute and has the effect of modifying or repealing the statute. Such was the case in

Neal v. *Delaware*, 103 U. S., 370.

The statute of Delaware passed before the Fifteenth Amendment restricted the right of suffrage to white male citizens, and required that jurors should be voters and sober and judicious persons.

Concerning the effect of that amendment on these statutory provisions, Mr. Justice Harlan had this to say:

"Beyond question, the adoption of the Fifteenth Amendment had the effect, in law, to remove from the state Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward the statute, which prescribed the qualifications of jurors, was, itself, enlarged in its operation, so as to embrace all, who by the state Constitution, as modified by the Supreme law of the land, were qualified to vote at a general election."

The other instance referred to arises where the constitutional provision is in existence at the time the statute becomes a law. It is where the statute is silent, as to a constitutional right and contains no provision negativing that right. There the right is considered as recognized by the statute and as having no harmful effect upon the statute. A good illustration of this may be found in the case of

Cincinnati, N. O. & T. P. R. R. Co. v. *Kentucky*, 115 U. S., 321.

It is well settled law that a tax-payer is entitled to a hearing as to the assessment of his property for taxation. This right is thus well put by Bennett, J., in the case of

Slaughter v. *City of Louisville*, 89 Ky., 123:

"Taxes are not debts. Debts are obligations founded upon contracts, express or implied. But taxes are impositions levied for the support of the state government, or for county or city purposes. When they are imposed by authority, they operate on the tax-payer *invitum;* when they take the form of a percentum, there must be a valuation as a basis of the power to levy and collect them. The tax-payer is entitled to be heard in fixing this valuation. The basis of the right to collect taxes from him consists in the valuation of his property; and to deny him the right to be heard in making this valuation, would be the taking of his property without due process of law."

Now the Kentucky act of April 3d, 1878, relating to the assessment of railroad property for taxation by the Railroad Commission, though it provided that the assessment should be based upon a report of property and valuation made by the various railroad companies in the state to the State Auditor and by him laid before the Railroad Commission, contained no express provision entitling the railroad companies to be otherwise heard before the commission concerning the assessment of their respective properties. It was claimed by them in the case from the decisions of this court last referred to that it was the intention of the Legislature that they should not have other hearing before the commission, and because of this the act, and assessments made under it, were invalid. But this court held otherwise. Mr. Justice Matthews said:

"These meetings (of Railroad Commission) are public and not secret. The time and place for holding them are fixed by law. The proceedings of the board are required to be made matter of record, and authenticated by the signature of the quorum present. Any one interested has the right to be present. In reference to this point, the Court of Appeals of Kentucky, in its decisions in those cases, says (81 Ky., 492, 512): 'As we construe this act, although in the nature of an original assessment, the parties had the right to be heard and were in fact heard before the board passing on the question of valuation."

And again:

"And if the plaintiffs in error have the constitutional right to such a hearing for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it."

And he quotes from the opinion of Willes, J., in *Cooper* v. *The Wandsworth Board of Works*, 14 C. B. N. S., 180, 194, in a case where a hearing was deemed essential, the following language:

"Although there is no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

These, then, are the two instances, and the only two, which our research has brought to our knowledge where, as stated by Mr. Justice Matthews in that case,

"The Constitution and the statute will be construed together as one law."

But this court has also had something to say as to where the two will not be "construed together as one law," and where the statute is in conflict with the Constitution, it will have to give way to the latter. Before going to the construction of the statute in hand, it will be helpful to consider the principles laid down in those cases.

The case of

United States v. *Reese*, 92 U. S., 214,

involved a Federal statute, which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who, by unlawful means, hindered or delayed any citizen in doing an act required to be done in order to qualify him to vote or from voting at any election. Congress had a right to provide for the punishment of those who wrongfully refused or hindered a citizen from voting "on account of the race, color or previous condition of servitude of the voter," but not on any other account. The statute in question did not limit its operation to a refusal or hindrance on such acount, but was broad enough to cover a refusal or hindrance on any other account. It was held that it could not be made to apply only to those acts which Congress might rightfully punish.

Mr. Chief Justice Waite said:

"The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

In the Trade Mark Cases, 100 U. S., 82, there was under consideration a Federal statute, whose purpose "was to establish a universal system of trade-mark registration for the benefit of all who had already

used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries, which extended no such privileges to us, were excluded from them here."

Congress had power to pass a statute regulating trade-marks used in commerce with foreign nations and among the several states, and it was claimed that the statute could be limited by construction to such cases and thus made constitutional. It was held that this could not be done. Mr. Justice Miller said:

"It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished, which are not described in language that brings them within the constitutional power of that body."

And again:

"If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, viz., to make a trade-mark law which is only partial in its application, and which would complicate the rights which parties would hold in some instances under the act of Congress, and, in others, under the state laws."

In the case of

Spraigue v. *Thompson*, 118 U. S., 90,

Section 1512 of the Code of Georgia was involved. It required vessels bearing toward any port of that state, except coasters of such state and between its ports and South Carolina or Florida, to accept the pilot first offering his services. Section 4237 of Revised Statutes of U. S. provided that:

"No regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States."

The exception in the Georgia statute was in conflict with the United States statute. With it out, the Georgia statute would have been valid. It was proposed to make it stand by striking out the exception. Mr. Justice Matthews responded to this suggestion as follows:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute

which is unconstitutional may be rejected and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation, beyond the legislative *intent and beyond* what any one can say it would have enacted in view of the illegality of the exceptions."

In the case of *Baldwin* v. *Franks*, 120 U. S., 678, a Federal statute was involved which provided that, if two or more persons, in any state or territory, should conspire for the purpose of depriving any person or class of persons of the equal privileges or immunities under the law, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the law, they should be punished by fine or imprisonment.

Congress had power to pass a statute to punish conspiracies to deprive persons of their rights under the Constitution, laws or treaties of the United States; but this act was broad enough to cover conspiracies to deprive persons of their rights under any state law as well, over which Congress had no power.

It was claimed that the statute could be limited by construction to cases within the power of Congress, and thus upheld. This was denied by this court.

Mr. Chief Justice Waite said:

"It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws or treaties of the United States. The limitation which is sought must be made, if at all, by contruction, not by separation. This, it has often been decided, is not enough."

These are all cases where the right of construing a higher and a lower law together so as to make both stand was asserted and denied because by the plain letter of the latter something was attempted to be provided which was in conflict with the former. It is an application of the familiar principle in the construction of statutes that where "the language is plain, there is no room for the construction."

This principle is recognized by this court in the case of

Ruggles v. *People of Illinois*, 108 U. S., 536.

Mr. Chief Justice Waite there said.

"But Vattel's first general maxim of interpretation is that 'it is not allowable to interpret what has no need of interpretation,' and he continues: 'When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it.' (Vattel, Law of Nations, 244). Here the words are plain and interpret themselves."

And again in the case of

Board of Lake Comr's v. *Rollins*, 130 U. S., 662,

Mr. Justice Lamar said:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it (*Newell* v. *People*, 7 N. Y., 97; *Hills* v. *Chicago*, 60 Ill., 86; *Dunn* v. *Reid*, 35 U. S., 10 Pet., 524; *Leonard* v. *Wiseman*, 31 Md., 204; *People* v. *Potter*, 47 N. Y., 375; Cooley, Const. Lim., p. 57; Story, Const., 400; *Beardstown* v. *Virginia*, 76 Ill., 34). So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction (*United States* v. *Fisher*, 6 U. S., 2 Cranch, 358, 399; *Doggett* v. *Florida R. Co.*, 99 U. S., 72)."

We are now ready to undertake the construction of the McChord act in the particular put in question by us. Thus far, we have been dealing with the generalties. We have been in the air, as it were. But a firm grasp of general principles is essential to right thinking as well as to correct conduct.

In the first place, what does the language used by the Legislature of Kentucky say, and is it, or not, "plain" as to what it does say? If so, "there is no room for construction." It says that:

"Should said railroad company, or corporation, or any officer, agent, or employe thereof, charge, collect or receive a greater or higher rate, toll, or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided," then in that event,

"Said company or corporation and said officer, agent, or employe, shall each be deemed guilty of extortion."

And further, that,

"Upon conviction," *i. e.*, of charging, collecting, or receiving an excess rate, then in that event,

Such parties "shall be fined."

The language of the statute is absolute. In each case, if the condition stated exists, the result "*shall be*"—"shall be deemed guilty of extortion," if the fact of making such excess charge exists; "shall be fined," if convicted of so doing.

It is not provided that the making and fixing of the rate by the commission shall be *prima facie* evidence of guilt of extortion, as has been so often done in such statutes; nor is it provided "that in all trials of cases brought for a violation of any rate made and fixed by the commission, it may be shown in defense that such rate was unjust and unreasonable," as was the case with the Mississippi statute, construed by this court in *Stone v. Farmer's Loan & Trust Co.* On the contrary, the charging, collecting, or receiving an excess rate is itself made equivalent to extortion, *i. e.*, to the exaction of "more than a just and reasonable rate," which is its definition in Section 816, Kentucky Statutes, and in the front part of the McChord act. The party so acting "shall be deemed," *i. e.*, shall be judged guilty of extortion, *i. e., of charging*, collecting, or receiving more than a just and reasonable rate. And on the trial of the indictment, the sole issue involved is as to whether the defendant is guilty of so doing, and if convicted thereof, it or he is to be fined. Such is the "plain language" of the statute. It means that the making and fixing of the rates by the commission shall be final and conclusive, as to their justice and reasonableness. It is not necessary to use the words "final and conclusive" to express the meaning and intention that they shall be final and conclusive. The English language is not so cramped that other phraseology can not be made use of to convey the idea just as well, and that used by the Legislature of Kentucky in the McChord act does this. It can not be better described than in the language of the Supreme Court of Minnesota in the case of

> *State of Minnesota* v. *Chicago, M. & St. P. R. Co.* 38 Minn., 281,

construing the Minnesota statute invalidated by this court in the Minnesota case. It said:

"It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the Legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges;

that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable, and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

That such is the meaning and intent of the plain language quoted above from the McChord act is enforced by other considerations. It is enforced by contrasting this language with that used in the forefront of the act prescribing the matter to be investigated and determined by the Railroad Commission and its powers—in other words, the scope of its inquiry and action. That matter is whether or not, a railroad company or corporation is charging, collecting, or receiving extortionate freight or passenger rates," *i. e.*, rates in excess of what is just and reasonable or whether or not, it is "guilty of extortion," *i. e.*, of charging, collecting, or receiving more than a just and reasonable rate and if it determines in the affirmative, it is empowered to make and fix what it deems to be a "just and reasonable rate," which rate it has power thereafter to revoke or modify. It was held by Judge Evans in the Circuit Court, (103 Fed.), that the McChord act, by this provision, confers on the Railroad Commission judicial power in that it confers on it power to investigate and determine whether a specific railroad company is in a specific instance charging, collecting, or receiving more than a just or reasonable rate, which is a judicial question; that it confers on said body power to fix rates only as a result of such an investigation and determination and not generally; and that because of this fact, the act is unconstitutional and void. With this view we concur. But it is not within the scope of the argument advanced in this brief to urge it. What we do urge is, that by the plain language of the first part of this act, power is conferred on the Railroad Commission to investigate and determine whether, or not, rates being charged, collected, or received are just and reasonable—to fix rates which they may deem to be just and reasonable, if they determine that those that are being charged, collected, or received are not just and reasonable—and to revoke and modify rates so fixed by it. Thus the scope of inquiry before the commission is unrestricted. *Extortion before the Railroad Commission is an entirely different thing from what it is before the court on the trial of the indictment. Before the former, it is charging, collecting, or receiving more than a just and reasonable rate. Before the latter, it is charging, collecting, or receiving a greater or*

higher rate than that made and fixed by the commission. It is inconceivable that, if the Legislature had intended that on a trial of an indictment found under the provisions of said act, the matter of the justice and reasonableness of the rates fixed by the commission could be investigated or determined, that it would not have used some language from which such intention could have been inferred, and that it would not have refrained from saying in positive language that, if such excess rates were charged, the party so charging "shall be deemed guilty of extortion," and that, if it was convicted of so charging, it "shall be fined."

The construction we have placed on the "plain language" of that portion of the McChord act put in question by us is still further enforced by a consideration of what brought that act about. Unquestionably, its origin was the decision of the Court of Appeals of Kentucky in the case of

L. & N. R. R. Co. v. *Com.*, 99 Ky., 132,

holding Section 816 of Kentucky Statutes, unconstitutional. The ground upon which it was held unconstitutional was that the statute did not fix any "standard" by which the carrier might regulate its conduct. It lays down that, in order that one may be punished criminally, the law should erect a "standard," which may be known in advance. Now, according to the ordinary signification of the term a "standard" is always absolute; as, for instance, a standard of quantity, a standard of value, or a standard of style. It is never variable. That which is only evidence, or which in a certain contingency, may be set aside, can not be considered a standard. That the Court of Appeals of Kentucky used the word in this absolute sense in its opinion in that case would seem certain in view of the fact that it mainly relies upon two cases decided by the lower Federal courts in support of the doctrine laid down by it, in one of which it was held that the Legislature could not prescribe that the rates fixed by a railroad commission should be *prima facie* evidence of extortion in a criminal proceeding, and in the other of which that question was referred to as one requiring determination in a proper case, but not involved therein. Those two cases are—

L. & N. R. R. Co. v. *Railroad Com. of Tenn.*, 19 Fed., 679.
Chicago & N. Ry. Co. v. *Dey*, 35 Fed., 866.

In the first case Baxter, J., said:

"But the defendants say that their revision of tariff rates and suggestions in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and

ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners they do so at the peril of subjecting themselves to a multiplicity of suits by the state and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which by force of the *prima facie* effect therein given to the ex-parte action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or *quasi* criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. The authors of this statute have been careful to place this beyond doubt. It is therein made the imperative duty of the commissioners, in the event any railroad company refuses to adopt the rates to be prescribed by them, to institute and prosecute a suit, as hereinbefore stated, for every overcharge; and the juries called to try them will, by the express command of the statute, be compelled to find against the defendants and assess the penalties imposed, unless defendants establish by affirmative proof that its future net earnings, on the arbitrary basis declared by the act, will not exceed a fair and just return on the value of its property to be assessed for taxation, the jury being the exclusive judges of what a fair and just return is. This much is expressly commanded. But 'injured parties' are left to the exercise of their own discretion whether they will sue or not. Nevertheless, by way of inducement, the *prima facie* effect given by the act to the judgment of the commissioners supplies them with the requisite proof to sustain their actions, and, as an additional encouragement, the act offers ten times the amount of the damages sustained, and a reasonable attorney's fee, to be paid by the railroad company. No railroad company in the state can successfully cope with the litigation that will inevitably follow a refusal by it to conform to the requirements of the commissioners in the particular mentioned. Through the indefinite terms of the statute, severity and multiplicity of its penalties, the impossibility of determining in advance of the verdict of a jury in the particular case, what is and what is not a violation of its provisions, the power conferred or attempted to be conferred on juries to define the offense and then inflict punishment, coupled with the *ex post facto* effect given to their verdict, involves everything in uncertainty and commits every railroad corporation in the state to the mercy of the commission. By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the state to the public use, without that just compensation provided for by the Constitution. In a word, the commission, under the terms of this act, hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands."

In the second case, Brewer, J., said:

"Another proposition of complainant is that the provision making the schedule *prima facie* evidence in all suits is an infringement of the right to trial by jury guaranteed by the Constiution of Iowa, and those provisions of the Iowa and Federal Constitutions to the effect

that no person shall be deprived of property without due process of law; the argument being that in trials by jury all questions of fact are to be determined by a jury, and should not be prejudged by the action of any other board or officer; that the state should be compelled to prove that the charge was unreasonable, and not compel the defendant after this *prima facie* evidence, made by strangers to the litigation, and not from examination of the facts in the particular case, had been received, to prove that the charge was reasonable. In support of this contention the cases of *Plimpton* v. *Somerset*, 33 Vt., 283; *Francis* v. *Baker*, 11 R. I., 103; *State* v. *Beswick*, 13 R. I., 213, are cited. On the other hand, it is contended by the defendants that the Legislature has power to change the rules of evidence, and that that is all that is done by this provision, and that, even in the absence of such express language in the statute, the fact that the schedule had been established by competent authority as a schedule of reasonable maximum rates would make it *prima facie*, if not conclusive, evidence."

In the very late case of ex parte Young 209 U. S., 123, Mr. Justice Holmes after citing with approval the opinion of Judge Evans in L. & N. v. McChord, 103 Fed., 216-223, said on page 147:

"If the law be such as to make the decision of the Legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, M. & St. P. Ry. Co. v. Minnesota, supra. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

It counts nothing that a Legislature can not provide such a standard, as we have maintained in the former part of this brief. Its power, constitutionally, in this particular was not under consideration in that case, and the court may never have investigated that question, and may not have been enlightened in regard to it. The matter in hand was what it could do constitutionally in creating statutory crimes or offenses, and it held that in order to do so, it must "erect" a "standard." And by this it meant not something that was not a "standard," but was only *prima facie* evidence, or that, in a certain contingency, might be set aside, it being left to a jury to determine whether it should be given conclusive effect or should be set aside. It means something that was absolute, and settled guilt or innocence in every contingency, just like a yard stick, a bushel or a gold dol-

lar settles quantity or value, and is, in the real significance of the word, a standard.

It was in view of this decision and the former statute invalidated by it that the McChord act was passed, and its purpose was to erect a standard as to what was a reasonable and just rate for any service to be rendered by a railroad company or corporation, and that was the determination of the Railroad Commission on the subject. It therefore intended that the action of that body should be final and conclusive, and hence the absence of a provision making the rate so fixed *prima facie* evidence of what was just and reasonable, instead of the provision making the charge of an excess rate equivalent to extortion and subject to punishment absolutely, and in the absence of a provision saying that injustice and unreasonableness of the rate fixed might be relied on, as a defense to the indictment, as was provided in the Mississippi statute.

But again, pending the consideration of the McChord act in the house, an amendment was offered to Section 3 of the act, a part of which was that "the defendant shall be permitted, upon trial, to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll or compensation," and it was rejected. This may be but a slight circumstance bearing upon the construction of the act and we only refer to it as such. It shows that everything in relation to our construction of the act tends to bear it out.

We concede that the presumption is, in the absence of a consideration of the question in the light of all the circumstances, that the act is constitutional and that proper respect towards the Legislature of Kentucky requires that this court should indulge that presumption. Our contention is that this presumption is rebutted, and that it is clear upon such a consideration of the act that it is unconstitutional in the particular claimed, and that therefore so much of the act, at least, must go the way of numberless other statutes that have been so declared.

We do not contend that in every case the absence from such a statute of an express provision to the effect that the fixing of the rates in question shall only be *prima facie* evidence of their reasonableness, or to the effect that they may be disregarded if shown to be unjust, provides that the rate fixed shall be conclusive and shall not be inquired into. What we claim is, that this act, providing that the railroad corporation or company charging an excess rate, "shall be deemed guilty of extortion," and that if convicted of so doing, "shall be fined," instead of providing that the fixing of the rates by the commission shall be *prima facie* evidence of guilt of extortion and omitting a provision

to the effect that, on the trial of the indictment, the rates may be shown to be unreasonable, means and can mean nothing else than that the rates so fixed "shall be conclusive and shall not be inquired into." The act says in express terms that charging an excess rate is guilt of extortion—not that it is *prima facie* evidence of guilt. It says further that conviction of charging such excess rate shall be followed up by a fine—not that it shall be so followed up unless the fixed rate is shown to be unjust.

And we maintain that our contention, as to the meaning of the words, so used, to be drawn from the words themselves, is enforced by the considerations referred to and that there is not a solitary consideration to the contrary.

This is not a case where the statute and Constitution can be read together. It does not come within either of those two instances, which we have stated, in which they can be read together. It is a case where the plain language of the statute is in conflict with the Constitution, and must, therefore, give way. It can not be made constitutional by changing the language used or narrowing its meaning or by introducing words of limitation, which are not there. To do so, would be "to make a new law, not to enforce an old one"—to make a law which the Legislature of Kentucky did not make—or to make a limitation "by construction, and not by separation," neither of which can be done by this court.

Nor does the absence of a direct provision that "the rates fixed shall be conclusive and binding and not inquired into" have the effect of making "the rate, itself, *prima facie* evidence of its reasonableness."

Much less does the omission from the act of a provision making the fixing of the rates by the commission *prima facie* evidence of their reasonableness or permitting their unreasonableness to be urged as a defense; its silence in this particular, or the absence of any statement on the subject leave "the matter open to the full operation, through the judiciary, of all the constitutional provisions," or have the operation and effect of making the rates fixed only *prima facie* evidence of their reasonableness.

The idea that the rates fixed shall be final and conclusive and not inquired into can be expressed in other language than that direct language itself. It so conveyed, in the act in question, by providing that charging an excess rate does in and of itself amount to extortion, *i. e.*, to charging more than a just and reasonable rate, and that conviction thereof shall be followed by punishment, at least when these provisions are regarded in the light of the considerations referred to.

Undoubtedly, on the trial of an indictment, found under the act, the defendant could urge its unconstitutionality. Perhaps he could

waive this matter and urge as his sole defense, the unconstitutionality of the rate, *i. e.*, that it was unjust and unreasonable. If he could do so, it would be by the grace of the court and not by the grace of the Legislature of Kentucky. And the graciousness of the court would not relieve the act of the Legislature of its ungraciousness. The constitutionality of the act is not saved, therefore, by the fact that the defendant would be entitled to avail himself of his constitutional right to attack the reasonableness of the rate fixed on the trial of the indictment. The constitutionality of a statute is not to be determined by what rights a party has, notwithstanding the statute, but by what rights the Legislature intended he should have—otherwise, no statute would be unconstitutional. If the Legislature, by a statute, intended to deny one that which is a constitutional right, the statute is unconstitutional, though the right in fact is unaffected thereby.

For these reasons we submit that the McChord act is unconstitutional in the particular claimed.

III.

So much of the McChord act as prescribes penalties for charging rates in excess of those fixed by the commission being unconstitutional, the rest of the act fails and it is wholly void. It is not a law of the state of Kentucky.

It is well settled that, in order to overthrow an act entirely, it is not sufficient that it is unconstitutional in part. If the act is capable of separation into parts, as the phrase goes, the parts that are constitutional will stand, though another part may be invalid on account of its unconstitutionality.

It is important, then, to know what is the test by which it is to be determined whether a given act is capable of separation into parts. It is well stated by this court in the Virginia Coupon Cases, 114 U. S., 305. Mr. Justice Matthews there said:

"Where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even if the other part should fail.

"To hold otherwise, would be to substitute for the law intended by the Legislature, one they may never have been willing by itself to enact."

No better statement of the law on the subject can be found, and it is useless to cumber this very lengthy brief with additional citation

of authority in support. One illustration of its application by this court will be helpful, however. We refer to the case of

Barron v. *Burnsides*, 121 U. S., 186,

involving a statute of Iowa which provided by its —

SECTION 1. That any corporation of certain character foreign to that state desiring to transact or to continue to transact business in that state should file with the Secretary of State certain documents, and an application for a permit to do business in the state, containing a stipulation that the permit was subject to each of the provisions of said act, and that, thereupon, the Secretary of State should issue it a permit, and it should have a right to do business in the state.

SEC. 2. That no such foreign corporation, which had not complied with said provisions, should have the right of eminent domain or exercise any of the rights and privileges conferred upon corporations.

SEC. 3. That any such foreign corporation, which should remove any suit against it in the state court to the Federal courts should thereupon forfeit its permit and right to do business in said state.

SEC. 4. That any such foreign corporation that should do business in said state without having complied with said statute should be liable to a penalty of $100 a day for each and every day that it did business in the state, and any agent, officer, or employe, should likewise be liable.

Under this statute an indictment was found against the agent of a railroad corporation, and it was urged in defense that Section 3 was unconstitutional, and that the rest of the act went with it. This defense was upheld. Mr. Justice Blatchford said:

"It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in Section 3, of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the state court into the Federal court, either on the ground of diversity of citizenship, or of local prejudice. The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the Secretary of State, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the state, might not be an unreasonable or objectionable requirement, if standing alone, but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit and, with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal court."

Let us apply the law, thus laid down in these cases, to the one in hand. Are, or are not, the parts of the McChord act distinctly separable so that each can stand alone? Is the court able to see and to declare that the intention of the Legislature of Kentucky was that the

part of that act conferring power on the Railroad Commission to hear and determine whether a specific corporation, in a specific instance, has charged, collected, or received an extortionate passenger or freight rate, and if it so determines, to make and fix what it may deem a just and reasonable rate, should be enforceable, even if the rest of the statute should fail.

It will be borne in mind, as heretofore stated, that Judge Evans, in 103 Federal, decided that this part of the act is unconstitutional, also, and for this reason, invalid. We are not considering that proposition, but assuming, for the sake of the argument, that it is not unconstitutional, does it not go because of the unconstitutionality of the remainder of the statute? We contend that it does and that the question, above put, must be answered in the negative. The act consists of five sections. The last part of the first section and the second, third, and fourth sections, all relate to the criminal proceedings provided for enforcing the rates fixed by the commission, and are unconstitutional. The first part of the first section and the fifth section relate to the proceedings before the commission. There is an entire absence of anything tending to show that the Legislature intended that the commission should have this jurisdiction, if the means provided for the enforcement of its action should fail. On the contrary, there is no room for doubt that it had no such intention.

If these three propositions, which we have advanced and undertaken to maintain, are true, then the McChord act is not a law of the State of Kentucky.

We, therefore, respectfully submit that the judgment appealed from should be affirmed.

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